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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 785

EASTERN AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
Attorneys for Petitioner,
Eastern Air Lines, Inc.,
825 Citizens & Southern
National Bank Building,
Atlanta 3, Georgia.

JAMES H. BRATTON, JR.,
ALLISON WADE,
Of Counsel.

March 14, 1960

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OCTOBER TERM, 1959.

No. .....

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Eastern Air Lines, Inc. ("Eastern") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case October 7, 1959, rehearing denied December 15, 1959.

Opinions Below.

The opinions and orders of the Civil Aeronautics Board ("the Board" or "the CAB") are not officially reported, but appear in the printed joint appendix used in the Court of Appeals below (1313a-1400a, 1469a-1497a, 1509a-1536a).[1]

The opinion of the Court of Appeals, printed in appendix B hereto, is reported at 271 F. 2d 752 (2d Cir. 1959).

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[1] Unless otherwise indicated, numbers in parentheses refer to pages of the joint appendix.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 7, 1959. Eastern's timely-filed petition for rehearing was denied December 15, 1959. This Court's jurisdiction is invoked under 28 U. S. C. §1254 (1) and 49 U. S. C. §646 (f).

Questions Presented.

1. May the Board, required by statute (Civil Aeronautics Act of 1938[1] §1005 (f), 49 U. S. C. §645 (f); Administrative Procedure Act §§8 (b), 10 (e), 5 U. S. C. §§1007 (b), 1009 (e)) to make adequate findings on the elements of public convenience and necessity before certificating a new air service (Civil Aeronautics Act of 1938 §§2, 401 (d), 49 U. S. C. §§402, 481 (d)) lawfully certificate a new service in a given market but refuse to make findings measuring the expectable revenues or volume of traffic against expectable costs of operation and capacity in the market?

2. Under this Court's "*Ashbacker*" doctrine (*Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. 327 (1945)), may the Board in an airline new route case, known as an "area proceeding," lawfully refuse to make proper findings upon a timely-raised issue of "mutual exclusivity" as between (a) an application, heard in the proceeding and granted, for extension of existing routes outside the "area" of the case to points within the "area" [Docket 7242 of Northwest Airlines, Inc. ("Northwest") seeking extension of its existing Seattle-Minneapolis-St. Paul-Milwaukee-Chicago route into the Southeast to new

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[1] The Civil Aeronautics Act of 1938, 52 Stat. 977, 49 U. S. C. §§401-705 was replaced in all pertinent parts without material change by the Federal Aviation Act of 1958, 72 Stat. 737, 49 U. S. C. §§1301-1542. References herein to "the Act" shall be to the 1938 Act unless otherwise indicated.

points Atlanta, Tampa and Miami (13a)] and (b) an application, not consolidated in the proceeding, for extension of existing routes within the "area" of the case to points outside the "area" [*e.g.*, Eastern's Docket 7293 seeking extension of Eastern's existing Miami-Tampa-Atlanta-Chicago route to Milwaukee-Minneapolis/St. Paul and Seattle (10a)] where both applications contemplate air service between the same points [between Miami/Tampa/Atlanta and Milwaukee/Minneapolis-St. Paul/Seattle]?

3. Is it lawful for the Board, in airline "new route" proceedings, to announce its determinations, prior to consideration of all relevant and material portions of the record, by "press release," without supporting reasons or consideration of all pertinent and material fact?

4. May the Board, charged by statute (Civil Aeronautics Act of 1938 §401(d), 49 U. S. C. §481(d)) with the duty to find an applicant "fit, willing and able" before authorizing it to engage in air transportation, refuse to consider as an element of the carrier's "fitness" the timely-raised question whether the carrier, by instigating an agent to make *ex parte* representations to the Board on its behalf, violated section 7 of the Administrative Procedure Act (5 U. S. C. §1006) and section 300.2 of the Board's Principles of Practice (16 F. R. 2932, March 30, 1951) and was therefore unfit, or comparatively less fit than other applicants, to engage in air transportation under the Act?

Statutes Involved.

Involved in this case are the Fifth Amendment to the United States Constitution, sections 2, 401, 1005(f) and 1006(a) of the Civil Aeronautics Act of 1938 (52 Stat. 980, 987, 988, 1023, 49 U. S. C. §§402, 481, 645(f), 646(a)), and

sections 3(a), 7(c), 7(d), 8(b), 10(a), and 10(e) of the Administrative Procedure Act (60 Stat. 237, 241, 242, 243, 5 U. S. C. §§1002(a), 1006(c), 1006(d), 1007(b), 1009(a), 1009(e)). These sections are printed in Appendix A hereto.

Statement of the Case.

This matter originated as a "new route" proceeding before the Board known as the *Great Lakes-Southeast Service Case.*

Eastern is a certificated air carrier, authorized to engage in air transportation between (*inter alia*) Chicago and Florida, between Detroit and Florida, and between Cleveland, Pittsburgh and Florida, all three routes including intermediate points. Prior to the Board's decision in the proceeding before it (1313a-1400a), Eastern competed with Delta Air Lines, Inc. ("Delta") between Chicago and Florida, but no other carrier was authorized between Detroit and Florida nor between Cleveland, Pittsburgh and Florida. The Board's decision authorized Northwest to operate between Chicago, Atlanta, and Florida, Delta to operate between Detroit and Florida, and Capital Airlines, Inc. ("Capital") between Cleveland, Pittsburgh and Florida (and also between Buffalo and Florida, where previously there had been no certificated service, but for which authority Eastern had applied, that Eastern application being denied by the Board's order). All of the new certifications were competitive with Eastern.

Long prior to the institution of the proceeding before the Board,[1] Eastern had applied (application under Docket

[1] Actually, Eastern's Docket 7293 was filed after the Board's Chief Examiner issued a notice of prehearing conference (1), but before the Board issued its first consolidation order in the case (79a-90a). Eastern's Docket 3207 had originally been filed in 1947, *eight years before* activation of the proceeding before the Board.

3207) for routes between Chicago and Milwaukee and Minneapolis/St. Paul ("Twin Cities")(8a) and (Docket 7293) between Chicago and Seattle via intermediate points, both applications being for routes competitive with Northwest's existing authority (10a).

In response to the notice of prehearing conference (1), various carriers, including Northwest, filed applications for Chicago-Florida authority. Delta and others sought Detroit-Florida authority and Capital and others sought Cleveland-Pittsburgh-Florida authority. All requested that their applications be considered in the proceeding. Eastern requested that the proceeding be strictly limited in scope and not include issues of traffic moving beyond Chicago but, in the event that the needs for service of traffic moving between points within the "area"[1] and points outside the "area" north and northwest of Chicago were put into issue by consolidating into proceeding such applications as Northwest's Docket 7242, consolidated and concurrent hearing be granted Eastern's Dockets 3207 and 7293, since those applications were "mutually exclusive" within the meaning of the *Ashbacker* doctrine of Northwest's application (95a-97a; see also 24a-25a, 27a). Pursuant to Eastern's applications, Eastern would have been authorized to offer services identical to those proposed by Northwest.[2]

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[1] Defined by the Board as "the area extending from Chicago, Ill., Detroit, Mich., and Buffalo, N. Y., on the north, Indianapolis, Ind., Louisville, Ky., and Atlanta, Ga., on the west, Washington, D. C. and Baltimore, Md., on the east and Miami and Tampa, Fla., on the south." (84a.)

[2] Northwest's *existing* Seattle-Twin Cities-Milwaukee-Chicago *authority* plus its *application* for Chicago-Florida authority if not restricted permitted Northwest to offer Seattle, Twin Cities, and Milwaukee service via Chicago to and from Florida (not previously authorized to any carrier). Eastern wished to combine its *existing* Chicago-Florida *authority* with its Chicago-Milwaukee-Twin Cities-

The Board refused to consolidate the above-described Eastern applications,[1] but it did include the Northwest application to duplicate Eastern between Chicago and Florida (13a, 89a).[2] Other applications of other carriers, principally for authority competitive with Eastern, were also consolidated into the proceeding. Certain Eastern applications proposing new routes wholly within the area were also consolidated.

On April 28, 1956, prior to the hearing before the Board, Eastern sought review of the Board's consolidation order in the Court of Appeals for the District of Columbia Circuit, alleging that the Board's order did violence to the *Ashbacker* doctrine and requesting that court to direct the Board to hear Eastern's excluded applications for Florida-Milwaukee-Twin Cities-Seattle authority in any proceeding that might consider Northwest's applications for Seattle-Twin Cities-Milwaukee-Chicago-Florida authority. The Court of Appeals dismissed the petition for want of jurisdiction, explaining that the orders complained of were interlocutory and not ripe for review. However, the Court

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Seattle *applications* to offer Seattle-Twin Cities-Milwaukee-Florida service via Chicago. Both Eastern's and Northwest's applications sought to combine existing with applied-for routes in order to operate between points within the "area" and points outside the "area." The only difference was that Eastern's *existing* authorizations were within the "area," and Northwest's were outside the "area," and Eastern's applied-for authority was *outside* the "area," while Northwest's application was for new authorizations *within* the "area." Eastern wished to go north and west into the Northwest from the Southeast, while Northwest wanted to proceed south and east into the Southeast from the Northwest.

[1] Eastern repeatedly urged the "mutual exclusivity" of its applications with Northwest's and sought their consolidation into the case. (See, *e.g.*, 24a-25a, 27a, 33a-36a, 96a-97a.)

[2] The Northwest application did not contemplate point-to- duplication of every Eastern city on the Chicago-Florida ro ut it did include the major cities which contribute the bulk the traffic support for the route.

in *dicta* extensively explained that it did not disapprove of the Board's action, and indicated that where an "area" proceeding would become a transcontinental case, *Ashbacker* would not apply. *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 243 F. 2d 607 (D. C. Cir. 1956). The Court below ruled that that case was not *res judicata* (App. B, p. B4, n. 8).

The proceeding went to hearing before an Examiner of the Board. Prior to the hearing, Eastern had requested Northwest to supply load factor data (relationship of seats available to seats occupied) for its Chicago-Twin Cities-Seattle route; however Northwest refused to supply those data. At the hearing, Eastern again requested Northwest to submit those load factor data, and when the carrier refused, Eastern attempted to subpoena (273a) the information, pointing out that those materials were relevant to numerous issues, including that of "mutual exclusivity" (176a, 184a-186a). The Examiner refused to issue the subpoenas, ruling, *inter alia,* that the data sought were not relevant to any of the issues in the proceeding (187a-189a, 192a).[1] Eastern also cross-examined Northwest's witnesses about the ability of the Seattle-Twin Cities-Milwaukee-Chicago-Florida route to sustain more than one carrier. Northwest's witness refused to testify that the route would economically support two carriers (178a-184a), and no party offered any evidence that the route described could economically sustain the operations of two carriers.

Briefs were filed with the Examiner, Eastern requesting the Examiner to make findings on the issue of "mutual exclusivity" between Eastern's applications and Northwest's, pointing out that the record on the issue was incomplete, because, among other things, it lacked essential load factor data on Northwest's operations (515a-17a). The

[1] The Board upheld the Examiner (1484a-85a).

Examiner made no findings on the "mutual exclusivity" question in his Initial Decision (591a-974a).

Exceptions to the Examiner's Initial Decision and Briefs were filed with the Board.

One of the most provocative issues of the proceeding before the Board was whether Capital's equipment situation was such that the carrier was unfit to undertake additional route responsibilities. The Board's Bureau of Air Operations (which serves in a kind of *amicus curiae* capacity) had taken the position before the Examiner that Capital should be selected for the Buffalo-Miami route, but subsequently concluded that "because of a change in the equipment program of Capital" (*i.e.*, cancellation of order for jet aircraft) another carrier should be selected for the route (1043a-45a). On January 27, 1958, the day before oral argument was heard by the Board, the president of an aircraft manufacturer sent a telegram to the Chairman of the Civil Aeronautics Board "at the suggestion of Capital" advising that the manufacturer had entered into an agreement with Capital to sell the carrier 15 jet aircraft and to lease to it additional piston-engined equipment (1498a). At the oral argument, Counsel for the Bureau of Air Operations again reversed his field and supported Capital for the Buffalo-Miami route (for which Eastern was also an applicant).

On March 19, 1958, the Board commenced deliberations in the case below, the *St. Louis-Southeast Service Case*,[1] CAB Docket 7735 *et al.*, and others deferred for simultaneous consideration. Deliberations continued March 25, 26 and 27 (1571a-85a).

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[1] Petitions for *certiorari* are also pending in this Court with respect to the decision of the Court of Appeals for the District of Columbia Circuit, which reversed in part and affirmed in part the decision of the Board in the *St. Louis-Southeast Service Case* (October Term, 1959, Nos. 679 and 777).

On March 26, 1958, the Board announced by press release, without supporting reasons, its determinations to grant Northwest a route between Chicago, Atlanta, Tampa/St. Petersburg ("Tampa") and Miami, authorizing for the first time service between Seattle, Twin Cities, Milwaukee and Atlanta and Florida, Delta a route between Detroit, Atlanta, Tampa and Miami, and Capital a route between Cleveland, Pittsburgh, Atlanta, Tampa and Miami, all in competition with Eastern.[1] Capital was also authorized to become the first and only carrier operating between Buffalo and Florida (an authorization also sought by Eastern, but denied to Eastern by the Board.) (1275a-76a).

On October 2, 1958, the Board released its formalized decision (1313a-89a) giving reasons for the Northwest, Delta and Capital awards previously announced in its press release. With respect to the Chicago-Miami route awarded Northwest, the Board stated generally that the market was large and was growing and could sustain three carriers. It did not measure anticipated revenues against anticipated costs of operations in that market, however (1320a-37a), nor did it make any findings on the issue of "mutual exclusivity" raised by Eastern. With respect to the Capital award, the Board noted it agreed with the Examiner that the route should be awarded, pointing out that 285 passengers daily moved between Cleveland and Miami, and 195 between Pittsburgh and Miami (1337a-43a). Again, there was no balancing of revenues against expenses. The Board's reasons for granting Delta a Detroit-Florida route (and other authorities competitive with Eastern) are not localized in the formal opinion, but are scattered in various portions of the decision. Again, however, the Board

[1] The Delta and Capital awards also included some other points, again principally competitive with Eastern (1276a-81a).

made no findings to balance the revenues it may have expected Eastern and Delta to receive against the expenses it expected them to incur on the routes.

Eastern and others petitioned the Board for reconsideration. Eastern pointed out that the Northwest award violated the *Ashbacker* doctrine since Eastern had not been heard on its application for the authority granted Northwest (1436a-40a, 1458a-59a) and using the Board's own findings on the volume of traffic that Northwest would carry between points within the "area" and points outside the "area" Eastern showed that the route would not sustain two *schedules*, much less two *air lines* (1438a). Eastern also showed that Northwest's Chicago-Florida award was not based on adequate and lawful findings (1440a-60a). Eastern showed that operations by three carriers on that route (Northwest in addition to Eastern and Delta) would be uneconomic (1443a-52a), pointing out particularly that the Board had failed to balance traffic against capacity to be offered by all carriers, and that, by the Board's own findings as to the size of the market, each of the three carriers operating only one round trip per day would operate at marginal or money-losing load factors (1447a-51a).

Pursuant to section 1006 of the Civil Aeronautics Act (49 U. S. C. §646) Eastern filed in the Court of Appeals for the Second Circuit a petition for review (1544a-85a), and a petition for stay, of the Board's order.[1] The stay was subsequently denied on December 11, 1958, and the Court of Appeals issued its decision on the review questions October 7, 1959. On October 22, 1959, Eastern timely

[1] Capitol Airways, Inc. ("Capitol") and the City of Nashville, Tennessee prosecuted appeals as well as Eastern. National Airlines, Inc. ("National") filed, and subsequently dismissed, a petition for review.

filed a petition for rehearing which was denied by the Court on December 15, 1959.

The Court below discussed at length Eastern's *Ashbacker* claims respecting the Northwest award but ruled that "mutual exclusivity must be established" (App. B, pp. B5-B6) and held that Eastern had failed to show mutual exclusivity (App. B, pp. B5-B6). The Court stated:

> "We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made." (App. B, p. B6).

The Court also noted that when Eastern appealed the Board's consolidation order to the Court of Appeals for the District of Columbia, that tribunal had suggested "that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings" (App. B, p. B4, n. 8). However, in view of its holding, the Court below did not pass upon the possible inapplicability of *Ashbacker* (App. B, p. B4, n. 8).

With respect to Eastern's contention that the Board had failed to make appropriate findings on the sufficiency of the Chicago-Florida, Detroit-Florida and Cleveland/Pittsburgh-Florida markets to support additional carriers, the Court stated: "We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence" (App. B, p. B10). Eastern respectfully submits the Court below never focused upon the problem. It is true the Board did make certain findings as to the size of the markets involved, but it never examined the other side of the coin, namely, the capacity that would be offered to

serve the traffic. Eastern's point was that the Board is required to make appropriate findings upon *expenses* (capacity) as well as *income* (traffic) and to balance the two in order to arrive at a rational, logically and legally sound conclusion that a given market is of sufficient size to support additional carriers. That was the crux of the issue; but the Court below never disposed of it (see, *e.g.*, Eastern's Petition for Rehearing below, dated October 22, 1959, at p. 17).

The Court discussed at some length Eastern's contention that the Board had unlawfully prejudged the case by announcing by press release, without supporting reasons, its determinations to award the Northwest, Delta and Capital routes. While expressly not approving the practice, the Court held that Eastern's claim of prejudgment was unsound, apparently because Eastern did not claim that the interval between oral argument and the Board's tentative decision was so short as to preclude thoughtful consideration of the evidence, and because the Board, in its formalized decision (issued six months after its press release decisions) might have reached different results if the work of drafting the opinion indicated that a different decision was proper (App. B, p. B7). Eastern submits that the Court below erred in its holdings.

The Court below also discussed Eastern's contentions, regarding Capital's *ex parte* representations to the Board (detailed by Eastern in its Amendment to Motion to Reopen the Record before the Board, 1289a-92a, and its Petition for Review to the Court below, 1562a-63a), that Capital exerted improper *ex parte* influence upon the Board and otherwise prejudiced Eastern by not opening the facts to cross-examination and rebuttal. The Court below accepted the Board's assurances that the decision was not influenced by Capital's action. Moreover, it held the communication

was not improper because it was relevant to Board functions unconnected with the *Great Lakes-Southeast Case*, an entirely erroneous conclusion, Eastern submits, which should have at least been tested in hearing before the Board. Finally, the Court held that "there is no indication that Capital made any covert communication to members of the Board, and hence the recent case of *WKAT* v. *FCC*, 258 F. 2d 418 (D. C. Cir. 1958), is inapposite." (App. B, pp. B8-B9.) Eastern submits that the Court erred in the premises.

Reasons for Granting the Writ.

Over twenty years ago, Congress enacted the Civil Aeronautics Act of 1938 for sound regulation of the then-infant air transport industry. That Act was superseded without material substantive change by the Federal Aviation Act of 1958.[1]

New authority to engage in air transportation has been granted under a statute, section 401 of the Act, that has remained unchanged for more than twenty years and has never been definitively interpreted by this Court; nor, indeed, has it ever been squarely reviewed by any Court. Under that Act, the air transport industry has matured into the nation's number one common carrier of intercity traffic. (ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD FOR 1958, 2.) Some 50,000,000 persons flew on commercial air lines in 1958, and the air lines that year did a $2,900,000,000 business, compared with 1,306,000 passengers and $57,000,000 twenty years before in 1938. (*Ibid.*) That growth has been marked by varying and inconsistent interpretations of section 401 of the Act, and a noticeable lack of uniform application of

[1] See p. 2, n. 1, *supra*.

the interpretations placed on it by the Board. The confusion is understandable in view of the absence of any guidance from an authoritative Court.

New route cases now must be increasingly concerned with multiplication of existing services, and unsuccessful litigants will necessarily be seeking more frequent recourse to the Courts, unless this Court establishes some definitive guidelines for the instruction of the Board and the parties to proceedings before it.[1]

More and more, parties to Board proceedings, the Board, and the lower Courts will be confronted with problems identical, or similar, to those raised, but not resolved, by the decision below. This case, for example, may be considered a kind of "companion case" to Number 777 in this Court, *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* wherein Eastern has asked this Court to review the decision of the Court of Appeals for the District of Columbia Circuit on review of the Board's decision in the *St. Louis-Southeast Service Case.*[2] The Board proceedings involved the same and contiguous areas of the country, were considered and decided simultaneously by the Board, resulted in additional competition for Eastern, in each the Board committed the same legal errors, the same basic problems, all relating to section 401, were presented in Eastern's allegations of error

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[1] This does not say that the Act has not been before the Courts; it has produced its share of litigation, but §401 has never been squarely or broadly interpreted. The *Ashbacker* doctrine as applied to airline cases presents basically a §401 problem since it is concerned with the right to a fair hearing, and *Ashbacker* has probably contributed as much to recent case literature in Federal practice as any other legal doctrine, in view of its application to airline, radio, television, pipeline and other competitive Federal licensing.

[2] Trans World Airlines, Inc., ("TWA") is also seeking *certiorari* in this Court to review the *St. Louis Case. Trans World Airlines, Inc.* v. *Delta Air Lines, Inc., et al.,* October Term, 1959, No. 679.

in the appeals to the respective circuits, but the approaches by the respective Courts to Eastern's contentions were divergent (and, in at least one instance, in direct conflict), reflecting a disparity of views, and a need for authoritative direction by this Court.

Section 401 prescribes the manner in which air routes are granted and amended. It provides for hearings on applications for new route authority, and states that an application is to be granted if the route sought is required by the "public convenience and necessity", and the applicant is "fit, willing and able" to provide the air transportation proposed.

This petition urges this Court (1) to clarify for the Board, and for parties to proceedings before it, the Congressional intent behind the term "public convenience and necessity" and, as well, to state what findings are essential to sustain a conclusion that a new route is required by the "public convenience and necessity"; (2) to clarify the meaning of this Court's *Ashbacker* doctrine; (3) to reaffirm the right of a party to administrative proceedings to have his case judged on the merits following full consideration of all material and relevant facts, and without prejudgment publicly proclaimed and relentlessly defended; and (4) to define the limits of proper conduct for parties to administrative proceedings, setting forth for the Courts and administrative tribunals the sanctions for *ex parte* or other conduct exceeding the bounds of propriety and explaining the appropriate consideration of the qualifications of a party that offends the requirements of decency.[1]

Each of these matters is increasingly involved before the Board, and the Courts of Appeal, and with increasing

[1] The first three problems are presented for this Court's attention in *Eastern, supra*, No. 777. *TWA, supra*, No. 679, raises the *Ashbacker* issue.

inconsistency of treatment. Eastern respectfully submits that unequivocal guidance by this Court on these problems will materially assist the lower Courts, the Board, and parties before the Board in the avoidance (or speedy and just disposition) of those problems in the future.

I.

It Is In The Public Interest For This Court To Clarify The Requirements Of The Standard Of "Public Convenience And Necessity" In Air Route Cases.

Under sections 401(d)(1) and 401(h) of the Act, the Board must find a route required by the "public convenience and necessity" before it can be certificated.

No Court has ever determined what basic findings of public convenience and necessity are essential for a lawful disposition of an application for a new or amended certificate to engage in scheduled air transportation.

As to Eastern's contentions that the Board had not made proper findings on the economic sufficiency of various markets to support additional carriers, the Court below stated that "the Board's findings on size of market . . . [are] . . . adequately stated and supported by substantial evidence" (App. B, p. B10). Eastern submits that the Court's statement is no answer to the problem. It focuses only on the bright (revenue) side, and totally ignores the grim economic realities (costs), and it would relieve the Board of the unpleasant duty of determining how much particular services would cost.

Eastern presented to the Court below the proposition that a lawful finding of public convenience and necessity must include a finding weighing the size of a market against the capacity to be offered by all carriers, and the costs to

all of serving it. The Board admittedly made some findings on the volume of traffic in several markets, but it never related those volumes to the expenses that would be incurred.

Eastern submits that the Court of Appeals for the District of Columbia Circuit expressed the law properly; albeit in generalities, in *American Airlines, Inc.* v. *Civil Aeronautics Board,* 192 F. 2d 417, 421 (D. C. Cir. 1951):

> "governmental permissions for the future cannot be fashioned from pure fantasy, speculation devoid of factual premise. Public convenience and necessity in the sense of those statutes has a hard core of factual possibility which can be ascertained and evaluated only upon the basis of present and past events and conditions."

Any speculations about "size of the market" are meaningless unless related to estimates of the costs of serving those markets. This was recognized by the Board less than a year ago in the *South Central Area Local Service Case,* CAB Docket 7939 *et al.*, where the Board stated (CAB Order E-13648, mimeo. op. 62, Mar. 21, 1959):

> "in arriving at its decision on new route proposals the Board must evaluate all the traditional elements of public convenience and necessity, such as public need for the service, *potential traffic,* benefits involved, *cost of operation, commercial revenues,* subsidy requirements, *diversion,* etc." (Emphasis supplied.)

The record of every Board new route proceeding contains masses of documents compiling statistics with one end in view: to show that the applicant will serve a substantial segment of the traveling public at a sufficiently low cost to enable him to realize a profit, while his oppo-

nents will not serve as many passengers, or will lose money in the contemplated operation, or both. Invariably, these "revenue and expense" forecasts are requested by Bureau Counsel[1] to be supplied, the Examiner directs their submission, and the parties respond. Those estimates are the vitals of any presentation, and the proceedings below before the Board were no exception. The Examiner in his initial decision adverted to the revenue and expense estimates submitted by the parties (*e.g.*, 634a-38, 646a-48a, 649a-51a, 654a, 661a-63a, 672a-80a, 697a-702a, 711a-12a, 714a, 715a-17a, 718a-21a, 727a-29a, 739a-44a, 754a-56a, 758a, 761a-64a, 768a) but he made *no* findings or conclusions on the basis of those forecasts. Neither did the Board make findings on the forecasts submitted by the carriers of traffic they would expect to carry and the costs they anticipated they would incur in transporting it.

Eastern submits it is not enough for the Board to say, although the Court below apparently endorsed the approach, only that a particular market has so many passengers to justify certificating an additional air line to carry them. It must proceed from that point to determine the expenses that will accompany the transportation of that traffic by the carrier seeking to serve it and balance that traffic and those revenues against the capacity that will be offered and the costs that will be incurred, to determine rationally whether the public convenience and necessity require the proposed new service. The approach of the Court below would preclude any judicial review of any conclusion advanced by the Board that the public convenience and necessity required a service because the market was large enough. It is beyond the competence of a Court to substitute its judgment for that of the Board on the

[1] Counsel for the Board's Bureau of Air Operations (see p. 8, *supra*).

significance of "size of market," *but,* if the Board is required also to make findings as to expenses of serving the market, it is then possible to determine the basis upon which the Board acted and whether it reached a lawful and reasonable conclusion.

The Court is respectfully requested to define the requirements of lawful findings on the elements of the "public convenience and necessity".

II.

It Is In The Public Interest For This Court To Clarify Its *Ashbacker* Doctrine In Air Route Cases.

The *Ashbacker* doctrine is a concrete application of the notion that the right to a hearing under sections 401(c) and 401(h) of the Act is a right to a fair hearing. In its simplest terms, *Ashbacker* recognizes that where two parties desire a license for a facility that can be granted to only one, the due process right to a fair hearing requires that both applications be heard and determined concurrently. This Court stated in *Ashbacker* v. *FCC, supra* (326 U. S. at 327):

> "where two *bona fide* applications are mutually exclusive the grant to one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

A. The Problem is Significant and Spreading.

The Courts have struggled with the application of *Ashbacker* to air route cases[1] for over 10 years, and at a rate of

[1] The Court of Appeals for the District of Columbia declaring *Ashbacker* applicable to an air route case stated that: ". . . *Ashbacker* [is] a rule of substance and not . . . a mere prescription of form." *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F. 2d 17, 21 (1955).

slightly more than one case per year parties have appeared in Courts of Appeals urging application of the doctrine.[1] It arises in every Board proceeding of any consequence and the Federal Power Commission and the Federal Communications Commission contend with it as well.

B. The Confusing Decisions Below Are in Conflict.

A bewildering array of verbiage greets the researcher into the *Ashbacker* problem. Some of the difficulties are outlined by the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* F. 2d , 9 Ad. L. Dec. 2d 863 (D. C. Cir. 1959), printed as Appendix C hereto (see, *e.g.*, C6-C9), but the conflicts within that decision itself have made it a fecund source of certiorari petitions (numbers 679 and 777, October Term, 1959, *supra*). That decision illustrates some of the conflicts in the applicability of *Ashbacker* to various factual situations (and it also reveals a reversal of direction by the District of Columbia Circuit from the

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[1] *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 178 F. 2d 726 (D. C. Cir. 1949); *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board,* 181 F. 2d 777 (D. C. Cir. 1949); *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 184 F. 2d 545 (9th Cir. 1950); *Northwest Airlines, Inc.* v. *Civil Aeronautics Board,* 194 F. 2d 339 (D. C. Cir. 1952); *United Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F. 2d 13 (D. C. Cir. 1955); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F. 2d 17 (D. C. Cir. 1955); *North American Airlines, Inc.* v. *Civil Aeronautics Board,* 241 F. 2d 445 (D. C. Cir. 1957); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 243 F. 2d 607 (D. C. Cir. 1956); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 247 F. 2d 562 (D. C. Cir. 1957); *National Airlines, Inc.* v. *Civil Aeronautics Board,* 249 F. 2d 13 (D. C. Cir. 1957); *Delta Air Lines, Inc., et al.* v. *Civil Aeronautics Board,* ..... F. 2d ....., 9 Ad. L. Dec. 2d 863 (D. C. Cir. 1959) (now pending in this Court under Nos. 679 and 777, October Term, 1959), and this case below. All of these cases involved *Ashbacker* considerations and the *Ashbacker* case was cited in each one except the first *Eastern* case.

trend indicated by that Court in *Eastern, supra,* 243 F. 2d 607 (D. C. Cir. 1956)).[1]

The 1959 *Delta* case, *supra,* presents a square conflict with the holding of the Court below on procedural aspects of *Ashbacker.* The District of Columbia Circuit in *Delta, supra,* ruled that where a party had made a *prima facie* showing of mutual exclusivity, the *Ashbacker* doctrine applied (App. C, p. C14). In that case, in its petition for reconsideration before the Board, Eastern had shown, using the Board's own findings, that grant to TWA of a West Coast-St. Louis-Florida routing would preclude subsequent grant of that route to Eastern or anyone else (App. C, p. C19). The Court held that in those circumstances, "the Board's failure to make the necessary specific findings [on *Ashbacker*] deprived Eastern of the full hearing required by *Delta Air Lines* v. *Civil Aeronautics Board*" (App. C, pp. C19-C20).

Eastern made *precisely* the same showing in its petition for reconsideration before the Board in the proceedings below as it had made at the same point in time in the *St. Louis Case* (compare 1438a-39a with 618-19 of joint appendix used in *Delta* in the District of Columbia Circuit, and certified to this Court in Numbers 679 and 777, October Term, 1959), yet the Court below held that Eastern had made no showing of mutual exclusivity and that the Board could ignore Eastern's claim (App. B, pp. B5-B6).

In each case, on the same set of facts, *mutatis mutandis,* the Board had urged before the respective Courts that

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[1] When Eastern appealed the Board's consolidation order in the *Great Lakes Case* to the District of Columbia Circuit, that Court indicated that *Ashbacker* was not applicable when it would transform a "limited area proceeding" into a transcontinental case. Some three years later, in *Delta,* that same Court, and basically the same panel, held *Ashbacker was* applicable when a "limited area case" would become a transcontinental proceeding. Compare 243 F. 2d at 609 with App. C, p. C20; see also C14, C18, and B4, n. 8.

Eastern had not shown "mutual exclusivity" and it was therefore not required to make findings on the issue. The Court below adopted the argument and disallowed Eastern's *Ashbacker* claims (App. B, pp. B5-B6), while the Court of Appeals for the District in *Delta* rejected the Board's argument, and remanded the case to the Board to make adequate findings on mutual exclusivity (App. C, pp. C19-C20). Eastern submits that the Court of Appeals for the District of Columbia Circuit is right and the Court below was in error.

The conflict between these two cases is square and irreconcilable. This Court is respectfully requested to settle the question, find that the Board violated *Ashbacker*, and remand the case to the Board, and, at the same time, explain for the guidance of all the application of *Ashbacker* to air route cases.

III.

It Is In The Public Interest For This Court To Review The Board's Practice Of Prejudging Cases Through Its Press Release Decision Procedure.

Eastern contended in the Court below that it was denied fair hearing because the Board prejudged the issues of the proceeding and announced awards of valuable route authority to Northwest, Delta and Capital competitive with Eastern without giving supporting reasons and without considering all material facts. By publicly proclaiming its determinations by press release the Board fettered its discretion and precluded any open-minded consideration of the facts in the preparation of its formal decision.

Shortly after the Board's deliberations on the case, it announced its "tentative" decisions to award the North-

west, Delta and Capital routes (1275a-76a). Some six months later, it released its formalized decision announcing the reasons for the awards (1313a-1400a). The reasons supporting the award were based upon air traffic survey and financial data *which were not even in existence at the time of its press release decisions.* The use of those data was obviously considered by the Board essential to its decision. For example the Board relied upon 1957 air traffic survey data as the *principal* support for *every* major route award in the case, and, as well, for the denial of certain Eastern applications[1] (1321a, 1322a, 1324a, 1325a, 1328a, 1329a, 1333a, 1334a, 1337a, 1339a, 1344a, 1346a, 1347a, 1348a, 1472a, 1476a, 1477a, 1480a, 1481a, 1486a, 1487a). Indeed, the Board also referred to *June, September* and *October,* 1958 traffic data—obviously not available in *March,* 1958—to sustain its position (1473a). In support of the finding that Capital was "fit, willing and able" the Board stated it relied on 1958 financial data (1340a-41a), also not available in March, 1958.

Rule 36 of the Board's Rules of Practice[2] provides that, in making its decisions, the Board will consider the whole record, the Examiner's Initial Decision, and the exceptions to it, will resolve all issues of fact by the greater weight of the evidence and *then* issue an appropriate order. It has been judicially stated, *Saginaw Broadcasting Co.* v. *Federal*

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[1] It is interesting that the Court below stated that it had examined the Board's findings on the "size of the markets" and found those findings adequately stated and supported by substantial evidence. (App. B, p. B10). See discussion at 11, 16, 18-19 above. Yet those findings were based almost entirely on *1957* data not available when the Board prejudged the case by its March 26 and 31, 1958 press release decisions.

[2] Published in conformity with §3(a) of the Administrative Procedure Act, which also requires the Board to adhere to its rules as published.

Communications Commission, 96 F. 2d 554, 559 (D. C. Cir. 1938), that

> "the process which a commission properly follows in reaching a decision . . . necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and its credibility; (2) from attentive consideration of this evidence, a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion."

The Court below accepted the Board's assertions that its "press releases" were its "tentative decision" only, and subject to change (App. B., p. B7). However, section 8(b) of the Administrative Procedure Act requires that *all* decisions, including *"tentative"* decisions must contain findings and conclusions as well as the reasons or basis, therefor, upon all the material issues of fact, law, or discretion presented on the record.

The "press release" procedure pervades the Board's entire decisional process, it has been vigorously attacked as unlawful by one member of the Board, and was manifestly viewed by the Court below with considerable disapproval (App. B, p. B7). This Court is respectfully requested to declare the procedure invalid.

A. The Press Release Decision Procedure Has Far-Reaching Consequences.

Perhaps the best exposition of the wide-ranging effects of the "press release" procedure is set forth in Board Member Hector's dissenting opinion on reconsideration below (1521a-23a). It is there pointed out that, since

August, 1956, *all* major Board cases have their results foretold several months in advance of the formal order by "press release," that the formal decision invariably conforms in all major particulars with the announced predeterminations, that parties commence actions in reliance on the "press release," and that the Board loses its freedom of action to consider the case on its merits once the formal opinion is being prepared by the Board's opinion-writing staff for the Board's approval.

The Board itself admits that the situation represents an unhappy compromise arising out of an alleged necessity to prevent "leaks" (App. B, p. B7, n. 10).[1] If this Court will not call a halt to it, its use will spread to all administrative agencies adjudicating controversial matters attracting wide-spread public attention.[2]

Further, much future litigation will surely result, arising not only from Board proceedings[3] but also from other agencies. Unless and until the process is stopped, litigants before administrative agencies will be subjected to adjudi-

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[1] The very excuse that the Board cannot control untrustworthy participants in its decisional process should condemn the decisions themselves as being infected with impropriety.

[2] In point of fact, the Federal Communications Commission adopted the practice shortly after the Board's first experimentations with it. See FCC Public Notice 41611, February 7, 1957, "FCC To Announce Instructions In Docket Cases." A broadcast industry trade magazine explained that the Commission, like the Board, had been plagued with "leaks" in important television license and deintermixture proceedings and was adopting the Board's practice to combat the problem. 52 BROADCASTING 65 (Feb. 11, 1957).

[3] On February 15, 1960, a petition for review of a Civil Aeronautics Board Order was filed in the District of Columbia Circuit Court of Appeals where the petitioner alleged, *inter alia*, that the Board's "press release" procedure had prejudiced it. The "press release" itself was not included as an assignment of error, however. *Southeastern Aviation, Inc.* v. *Civil Aeronautics Board*, No. 15566 D. C. Cir., Petition for Review 6, subpara. (m).

cation by "press release"—an anathema upon any concepts of due process of law.

B. The Press Release Decision Procedure Is Unlawful.

The above discussion of the wide-spread use of the "press release" decision practice has touched on its illegality. It permeates the administrative process and deprives litigants of their rights to fair hearings and determinations of their cases fairly considered upon the records. Member Hector manifestly regarded the practice as unlawful and repeatedly said so (see, *e. g.*, 1521a-23a) and it is impossible to reconcile it with the requirements of the Administrative Procedure Act and Rule 36 of the Board's Rules of Practice. In fact, the Court below expressed considerable difficulty with the practice, and indicated disapproval (App. B, p. B7).

The Board in its deliberations sits as a fact-finding jury and it is axiomatic that jurymen should not announce their "tentative" conclusions prior to consideration of all the evidence. It was stated in *Pool* v. *C. B. & Q. R. Co.*, 6 Fed. 844, 850 (D. Iowa 1888) (ordering new trial because of juror's misconduct):

> "Now the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are too apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature. Where, therefore, a juror talks outside the jury room about a case pending and undecided before him, he gives the clearest evidence that he is not an impartial and unbiased juror. The very discussion of any matter by a juror elsewhere than in the jury room tends to the forming of false

> impressions and prejudgments. Nor will it do for a moment to accept the statement of the juror that what he has said or heard has not affected or influenced his judgment."

This Court can take judicial notice of human nature, as described in the passage quoted.[1]

Member Hector has pointed out that the Board (and probably other agencies as well) reach a decision and then turn the result over to a staff of professional opinion writers to justify the conclusion:[2]

> "It has happened that the agency members say to the opinion writers: 'Here's the answer. Go write it up in good legal style.' . . . Members are inevitably tempted to make decisions as a simple fiat and to leave it to professionals to figure out the reasons why."

Eastern's objections to the "conclusion-to-premise" approach inherent in the Board's "press release" proce-

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[1] It should be made clear that there is nothing but the most superficial resemblence between the "press release" practice and the rarely-used practice of this Court, and other courts, appearing sometimes in extraordinary circumstances, of announcing a *final* judgment before there has been sufficient time to reduce the judgment to writing. For example, in the *Little Rock School Case, Cooper* v. *Aaron*, 358 U. S. 1 (1958), this Court made it abundantly clear that it was announcing its *final judgment* after "having fully deliberated" on the issues and that the imminence of the new school year at Little Rock coupled with the physical impossibility of reducing the Court's already carefully reasoned decision to writing made it "important to make prompt announcement of our judgment." The "press release" decision practice of the Board is not even remotely comparable. This Court did not, and it is submitted would not, announce that it had "tentatively" decided to issue its order, but that it would make up its mind definitely and publish its opinion later after it had had time to look at the record in the case. The Court below did not confuse the two practices.

[2] Hector, *Government by Anonymity: Who Writes Our Regulatory Opinions?*, 45 A. B. A. J. 1260, 1264 (December, 1959).

dure is no mere insistence on procedural niceties. The reasons for requiring all ratiocinative processes to *precede* decision are basic to jurisprudence. The Court in *United States* v. *Forness*, 125 F. 2d 928, 942 (2d Cir.), *cert denied*, 316 U. S. 694 (1942) said:

> "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that opinion on paper."

In another case before it, the Court below criticized the SEC for issuing a "press release" announcing the Commission's intentions prior to a hearing, and clearly indicated that it would have reversed the Commission if the aggrieved party had not waived his objection to the prejudgment. The Court stated (*Gilligan, Will & Co.* v. *Securities & Exchange Commission* 267 F. 2d 461, 468-69 (2d Cir. 1959)):

> "the Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."

Eastern submits that precisely the same considerations are applicable here: the Board announced by "press release" its determinations prior to "hearing" or con-

sidering the facts upon which it ultimately based its award, namely the 1957 and 1958 traffic and financial data. The Court below did not consider Eastern's contentions in that light.

With respect to Eastern's claim of prejudice from the "press release", the Court below stated (App. B, p. B7):

> "We do not mean to express approval of the Board's practice of making public its tentative decisions. We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing."

In approving the Board's "press release decision" practice, the Court below misunderstood the facts and misapplied the law. Perhaps the Board did, as the Court stated, consider the evidence before it at the time of the "press release" decision. The significant fact, however, is that the reasons the Board set out to justify its decision *ex post facto* related to materials that were *not* before the Board when it made its predeterminations. Member Hector's criticism of the delegated opinion-writing process (Hector, *Who Writes Our Regulatory Opinions, supra*) confirms the proposition asserted by Eastern, namely, that the Board made up its mind, told its opinion writers to justify its predeterminations, and the opinion writers merely adapted the facts to suit the pre-conceived decision. Member Hector's criticism also answers the Court's second

point, namely, that "if the careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision." Member Hector pointed out (Hector, *supra*, 45 A. B. A. J. at 1263) that the marshaling of facts is *not* done by the Board members, but by an anonymous group of opinion writers who prepare the opinion to conform with the decision, and who can, and do, write opinions on either side of a particular proposition with equal facility. Viewed in that light, it is apparent that the "press release" *is* the decision, and since it does not appear clothed with supporting reasons, it is unlawful and violates the Administrative Procedure Act. *If* the Board marshaled *all* the material facts and made informed findings and conclusions on them before reaching, and announcing, its decisions, Eastern would have no complaint.[1] However, it could not be made clearer that this procedure was *not* followed by the Board when these pro-

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[1] Compare Member Hector's dissenting opinion in the Board's Second Supplemental Opinion in the proceedings below (1522a-23a):

> "As I read the Administrative Procedure Act and the Rules of Practice of the Civil Aeronautics Board, I think it is clear that the Members of this Board are bound to review and consider all of the relevant facts and arguments in a case before publicly announcing a decision, whether that announcement be by means of a press release or a formal opinion. • • • Since a majority of the Board, however, has decided to announce the Board's vote in all important cases by means of a press release, I believe that we must be prepared then to assert that prior to such announcement we have each reviewed the relevant factual and legal material, that we have considered all basic issues in oral discussion, and that the opinion-writing process is merely the formalization in writing of findings *already made* by the Board." (Emphasis supplied.)

ceedings were before it and, moreover, is not followed by the Board in any controversy before it.[1]

It is a matter of acute public interest that this Court reaffirm the right of litigants in administrative proceedings to a fair determination of the issues on the record, fairly considered, and not consign their fates to trial by press release.

Eastern asks this Court to rule upon the question: May an administrative agency make up its mind, vote, and publicly announce its determinations without giving supporting reasons and without ever considering material it later finds essential to its formal opinion and order, that is, material evidence not even in existence at the time of the vote, decision and announcement?

IV.

It Is In The Public Interest For This Court To Declare The Bounds Of Proper Conduct And Condemn *Ex Parte* Communications On The Merits Of Adjudicatory Matters Before Administrative Tribunals.

It is eminently in the public interest for this Court to restore public confidence in agency adjudication by unequivocally stating that a party to a contested agency adjudicatory proceeding who resorts to *ex parte* communications outside the scope and purview of recognized procedures, with the intent of influencing agency decisions, cannot profit by its own wrong doing.

The case below presents a flagrant example of unauthorized *ex parte* communication, uncorrected and unexplored by the Court below or the Board.

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[1] See, *e.g.*, *Eastern* v. *CAB*, No. 777 in this Court, where Eastern is requesting this Court to review the Board's "press release" decision practice used in the *St. Louis-Southeast Case*, *supra*.

A. The Problem Is Significant And Increasing.

Government regulation of business activity is one of the most significant factors affecting the national economy today. More, rather than less, Government regulation appears inevitable. Indeed, in almost all distribution and communications media[1] a license granted by the Federal Government is required before a service may be offered.

The Court of Appeals for the District of Columbia has indicated that persons resorting to extra-judicial methods cannot escape careful scrutiny of their over-all fitness for exercise of the responsibility of a Government license, and that their misconduct will weigh against them. See *WKAT* v. *F. C. C.*, 258 F. 2d 418 (D. C. Cir. 1958); *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (D. C. Cir. 1959). It is in the public interest that this Court affirm the rationale of those decisions so that all may know they cannot profit from improper activities before administrative tribunals.

B. The Court Below Erred in Approving Capital's *Ex Parte* Contacts with the Board and the Decision Conflicts with a Decision in Another Circuit.

The matter of Capital's fitness and ability, and particularly of Capital's equipment availability, was a critical issue before the Board (1043a-45a, 1046a-58a, 1063a-64a, 1460a-62a). The gist of the problem was that Capital had a shortage of modern aircraft at the time of hearing; during the hearing it testified that it would procure British Comet jet aircraft to operate new and existing routes. Subsequently, it abandoned its plans to acquire new aircraft. For that reason, the Board's Bureau of Air Operations withdrew its original recommendation of Capital

[1] Except the press, which is protected by the First Amendment to the Constitution.

for the route it was subsequently awarded, stating that unless Capital could show that it had the equipment to operate the route the Bureau had recommended, the Bureau would have to support another carrier for that route (see, *e.g.*, 1043a-45a, 1063a-64a).

One day before oral argument in the proceeding below an aircraft manufacturer sent to the Chairman of the Civil Aeronautics Board a telegram "at the suggestion of Capital" purporting to show that Capital had accomplished equipment arrangements that would make it possible to operate the routes it proposed (1498a).

The telegram was not served on other parties to the case and its transmission by the manufacturer was not bruited about. Consequently, Eastern and the other parties had no opportunity to rebut the contentions advanced, although Section 7(c) of the Administrative Procedure Act permits every party "to submit rebuttal evidence" and to conduct such cross-examination as may be required for a full and true disclosure of the facts.[1]

Eastern, when it learned, long after the "press release," of the development, requested the Board to consider whether or not Capital had procured the dispatch of the *ex parte* communication and what bearing Capital's action had on its fitness and ability to engage in air transportation (1289a-92a).

The Board's Principles of Practice (section 300.2) prohibit *ex parte* communications between Board members and parties to proceeding before the Board. Eastern contends that the Capital-inspired communication violated the Administrative Procedure Act and the Board's Principles of Practice and denied Eastern a fair hearing. In light of

[1] To the best of Eastern's knowledge, Capital and the sender of the telegram have not as yet actually entered into *any agreement*, although more than two years have elapsed.

WKAT and *Sangamon, supra,* the Court below should have remanded the proceeding to the Board for further hearing on Capital's action.

The Court below excused Capital on two grounds: (1) "the communication to the Board by the manufacturer was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case*" namely, an inquiry into passenger fares and into possible change of ownership of Capital (App. B, p. B9); and (2) "there is no indication that Capital made any covert communications to members of the Board", and thus the Court below held *WKAT* inapposite (*Ibid.*).

Eastern submits that the Court misconstrued the law and the facts and should have required hearings. With respect to the idea that the telegram was relevant to other Board functions, Eastern would point out that the Board's investigation of passenger fares was a pending contested proceeding to be decided upon a hearing record. The telegram would be as improper a method of getting any facts of Capital's purported equipment program before the Board for the purposes of that case as it was as a vehicle for approaching the Board in the route case. The purported explanation, advanced by the Board and accepted by the Court below, that the telegram related to the Board's power over control relationships between air carriers and aircraft manufacturers under section 408 of the Act is a sham on its face. Capital itself denied any section 408 implications (1500a).[1] And it later developed that no agreement at all had actually been entered into (1500a). Eastern asked a hearing on its charge that Capital *intended* by unauthorized,

[1] Unfortunately the record below does not contain Capital's letter to the Chairman of the CAB, which is referred to in the Chairman's letter (cited above, 1500a) as denying any §408 problems. The Board has not published Capital's letter.

illegal *ex parte* contact to influence the Board's decision (1289a-92a). The Board and the Court below would sweep the dirt under the rug and *deny* hearing.[1]

The timing of the telegram (one day before oral argument before the Board) gives rise to a strong presumption that the telegram was carefully calculated to influence the Board's decision and was designed for no other purpose. In light of the holdings of *WKAT* v. *FCC, supra,* and *Sangamon* v. *FCC, supra,* such an attempt to influence is improper and requires remand of the proceeding for consideration of the matter.

The Court's statement that "there is no indication that Capital made any covert communications to members of the Board" is simply contrary to the record (and at least is a matter which should have been determined by hearing before the Board and not by the Court below). The agency maxim *qui facit per alium facit per se*[2] condemns Capital. The telegram states on its face that the aircraft manufacturer sent the telegram at Capital's behest (1498a). Capital has nowhere in any of the proceedings below contested the validity of the telegram nor repudiated the manufacturer's authority to act on Capital's behalf. Therefore, the Court below erred in concluding, particularly without hearings, that Capital did not make covert communications to Board members. The facts are that (1) Capital procured the sending of the telegram, (2) the telegram was addressed to the Chairman of the Board, and (3) the telegram was not

[1] It is to be noted that the Department of Justice in another Board case on appeal has called for hearings on similar charges of unlawful conduct by a successful applicant for new route authority. Brief for Department of Justice incorporated into Brief for Respondent, pp. 52-53, *United Air Lines, Inc., et al.* v. *Civil Aeronautics Board, et al.*, Nos. 15414 and 15415 D. C. Cir., 1960.

[2] 1 Bl. Comm. 429.

served upon parties nor was it otherwise made public. Those facts require a finding that Capital did make covert, unlawful communications to the Board. In such circumstances, *WKAT, supra,* requires remand to the Board. It is clear that, if the Court below had understood the facts and had not made its error, it would have applied *WKAT* and remanded the case. This Court is respectfully requested to correct that error.

To the extent there may be degrees of venality attaching to various *ex parte* contacts, Eastern does not suggest that Capital was guilty of the improprieties shown in the *WKAT* case. However, the broad principles of *WKAT* and *Sangamon* show that *all ex parte* communications are improper and must be considered in connection with an applicant's fitness.

Sangamon, supra, recognizes that basic fairness requires that an adversary proceeding be conducted completely in the open. The Court there remanded to the Federal Communications Commission a proceeding where *ex parte* communications to the Commission had been made. Apparently, the basis for the ruling was that the communication violated the Commission's rules and denied other parties the opportunity to question or rebut. Precisely the same situation obtains here—the Capital telegram violated the Board's Principles of Practice and denied opposing parties opportunity to cross-examine and rebut.

Eastern requests this Court similarly to require the Board to hold hearings on Capital's misconduct, as in *WKAT* and *Sangamon.*

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. Smythe Gambrell,
W. Glen Harlan,
Harold L. Russell,
Attorneys for Petitioner,
825 Citizens and Southern National Bank Bldg.,
Atlanta, Georgia.

James H. Bratton, Jr.,
Allison Wade,
Of Counsel.

March 14, 1960.

APPENDIX A.

Statutes and Regulations Involved.

Fifth Amendment to Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001

Section 3(a):

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) description of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules

addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(60 Stat. 238, 5 U. S. C. §1002(a))

SECTION 7

HEARINGS

In hearings which section 4 or 5 requires to be conducted pursuant to this section——

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section

8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

(60 Stat. 241, 5 U. S. C. §1006)

SECTION 8(b):

SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the con-

sideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

(60 Stat. 242, 5 U. S. C. §1007(b))

SECTION 10(a):

RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(60 Stat. 243, 5 U. S. C. §1009(a))

SECTION 10(e):

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5)

unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

(60 Stat. 243, 5 U. S. C. §1009(e))

Civil Aeronautics Act of 1938, as amended, 52 Stat. 977, 49 U. S. C. §401

SECTION 2:

In the exercise and performance of its powers and duties under this Act, the authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

(52 Stat. 980, 49 U.S.C. §402)

SECTION 401:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on June 23, 1938, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by

regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity, otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

* * * * * *

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar

as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certifiy that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board, any such service is not operated, the Board may by order, entered after notice and hearing, direct that

such certificate shall thereupon cease to be effective to the extent of such service.

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

(52 Stat. 987, 49 U. S. C. §481)

SECTION 1005(f):

Form and Service of Orders

Every order of the Authority [Board] shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

(52 Stat. 1023, 49 U.S.C. §645(f))

SECTION 1006(a):

Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President

as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(52 Stat. 1024, 63 Stat. 107, 49 U.S.C. §646(a))

SECTION 1006(f):

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 346 and 347 of Title 28.

(52 Stat. 1024, 49 U. S. C. §646(f))

CIVIL AERONAUTICS BOARD, RULES OF PRACTICE IN ECONOMIC PROCEEDINGS, RULE 36.

SECTION 302.36 *Final decision of the Board.* Upon submittal of a case to the Board for final decision on the merits the Board will consider the whole record, including the initial or recommended decision of the Examiner or its tentative decision, and the exceptions thereto, will resolve all questions of fact by what it deems to be the greater weight of the evidence thereon, will make its decision, stating the reasons or basis therefor, and enter an appropriate order.

(17 F. R. 3020, Apr. 8, 1952)

Appendix A.

Civil Aeronautics Board, Principles of Practice

Section 300.2 *Hearing cases; improper influence.* It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

(16 F. R. 2932, Mar. 30, 1951)

APPENDIX B.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Nos. 341, 342, 344—October Term, 1958.

(Argued June 3, 1959 Decided October 7, 1959.)

Docket Nos. 25422, 25434, 25532.

EASTERN AIR LINES, INC., CAPITOL AIRWAYS, INC., NATIONAL AIRLINES, INC., CITY OF NASHVILLE and the NASHVILLE CHAMBER OF COMMERCE,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., CAPITAL AIRLINES, INC., *et al.*,

Intervenors.

Before:

CLARK,
Chief Judge,

LUMBARD and WATERMAN,
Circuit Judges.

The several petitioners bring their respective petitions seeking review of orders of Civil Aeronautics Board entered in the *Great Lakes-Southeast Service Case* wherein that

Board granted certain applications and denied others, all pursuant to Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, for certificates of public convenience and necessity to perform new air transportation service. The several petitions are each denied. Capitol moved for the appointment of a Commissioner or Referee to determine matters relative to procurement of Congressional testimony. This motion is denied.

WATERMAN, Circuit Judge:

Presented here for our decision are three separate petitions for review of orders of the Civil Aeronautics Board[1] arising out of the "Great Lakes-Southeast Service Case."[2] These orders marked the culmination of an extensive hearing[3] on new route applications for service between points in a specified geographic area of the Middle West on the one hand and Florida on the other. The Board's ultimate decision, insofar as pertinent to this opinion, was as fol-

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[1] The orders are E-13024, the Board's formal opinion in the *Great Lakes-Southeast Service Case*, rendered on September 30, 1958, and E-13211, entitled "Opinion and Order Granting and Denying Stay of Effective Date of Certificates," rendered November 28, 1958. In view of our disposition of the contentions herein we need not decide whether the second order was effective to supplement formal opinion, but see *Frontier Airlines* v. *CAB*, 259 F. 2d 808, 810-811 (D. C. Cir. 1958).

[2] Applications for new route certification are normally decided by the Board in a consolidated "area proceeding." The Board establishes a given geographic area. Thereupon all applications for routes within this area are considered jointly. This Board procedure was approved by the Supreme Court in *CAB* v. *State Airlines*, 338 U. S. 572 (1950).

[3] Some idea of the breadth and complexity of the investigation can be obtained from the following statistics. There were 42 route applications, made by 10 carrier applicants. There were 5 carrier intervenors, 40 civic intervenors, and 42 limited participants. The record consists of 29 volumes totaling 16,000 pages. The evidentiary hearing lasted 8 weeks. The Initial Decision covered 378 pages. The two orders here objected to consist of a modest 88 pages.

lows: Northwest Airlines was awarded a route between Miami and Chicago; the authority of Delta Air Lines was extended so as to permit Miami-Detroit service; and that of Capital Airlines[4] was extended so as to confer upon it authority to render service between Miami and the three cities of Cleveland, Pittsburgh, and Buffalo. Prior to these awards the route between Miami and Chicago was served by both Delta and Eastern Air Lines; Eastern offered the only single-carrier service between Miami and the cities of Detroit, Cleveland and Pittsburgh;[5] and between Miami and Buffalo there was no direct service. Petitioners are as follows: Eastern, which objects to all three awards; Capitol Airways,[6] an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes, which objects to the Board decision as to these routes; and the City of Nashville, Tennessee, which objects to the fact that the Board drew the geographical boundaries of the "area proceeding" in such a manner that service to and from Nashville was excluded from consideration.

Eastern

Eastern's primary contention is that the Board has violated the principle of *Ashbacker Radio Corp.* v. *FCC*, 326 U. S. 327 (1945) in failing to consolidate in this "Great Lakes-Southeast Service Case" an Eastern application for extension of its route authority from Chicago to Minne-

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[4] Capital Airlines is not to be confused with Capitol Airways, a petitioner herein. Capital is a certificated carrier whose routes cover much of the eastern half of the country.

[5] The Board has authorized "interchange" arrangements between Miami and these cities, providing for single-plane service over the routes of two airlines. From the briefs we gather that these arrangements have not been particularly successful.

[6] Capitol is an uncertificated carrier operating under a Board exemption. Its principal business has consisted of performing charter services for the military. For one year, ending July 1955, it conducted scheduled passenger operations within the State of Tennessee.

apolis/St. Paul so that this extension application would be considered along with the proposals by the other carriers for new service between Chicago and Miami. By its consolidation order E-9734, issued November 16, 1955, the Board eliminated from consideration in the proceeding all applications for service to areas north and west of Chicago. Eastern points out that, under the award here objected to, Northwest, which was previously certificated for service between Minneapolis/St. Paul and Chicago, will now be permitted to conduct direct service between Minneapolis/St. Paul and Miami.[7] Eastern further points out that its application for extension from Chicago to Minneapolis/St. Paul, filed eight years before Northwest's application for Chicago-Miami authority and contemplating exactly the same Miami-Minneapolis/St. Paul service as the Board has here awarded Northwest, was not given simultaneous, comparative consideration. Eastern contends that certification of Northwest for Miami-Minneapolis/St. Paul service will as a matter of economic fact preclude cerification of Eastern for that same service. Thus Eastern contends that the Board's procedure has violated the *Ashbacker* principle.[8]

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[7] Pursuant to the Board's consolidation order which denied any successful applicant the right to conduct nonstop flights between "beyond area cities" and points newly authorized in the proceeding, Northwest's flights between Minneapolis/St. Paul and Miami must stop at Chicago. The Board denied Eastern's demand that single-plane flights also be prohibited.

[8] Eastern's *Ashbacker* argument in the *Great Lakes-Southeast Service Case* has been before the courts once previously. Eastern petitioned the Court of Appeals for the District of Columbia to review the Board's consolidation order. The petition was dismissed, *Eastern Air Lines* v. *CAB*, 243 F. 2d 607 (D. C. Cir. 1956), on the theory that a consolidation order was not a "final order" for purposes of judicial review. Having dismissed the petition the court went on to suggest that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings. Eastern quite rightly contends that this decision is not *res judicata* in the present case; and, deciding the case as we do, we need not consider the possible inapplicability of *Ashbacker*.

Appendix B.

Ashbacker Radio Corp. v. *FCC, supra,* involved two applications for the construction of radio stations. The stations planned to operate at the same frequency and were located in cities less than fifty miles apart. The Federal Communications Commission found that these two applications as a matter of physical fact were mutually exclusive and thereupon granted one application without hearing and relegated the second to a hearing to be held later. The Supreme Court reversed the Commission, holding, as a matter of statutory construction, that two mutually exclusive applications must be granted a concurrent hearing. Although *Ashbacker* dealt only with physical exclusivity its doctrine soon found its way into aeronautical law, and was applied to applications for the same routes which were mutually exclusive "as a matter of economic fact." *Northwest Airlines* v. *CAB* (D. C. Cir. 1952), 194 F. 2d 339; *Delta Air Lines* v. *CAB* (D. C. Cir. 1955), 228 F. 2d 17. See also *Seaboard & Western Airlines* (D. C. Cir. 1949), 181 F. 2d 777; *Western Air Lines* v. *CAB* (9 Cir. 1950), 184 F. 2d 545.

On the other hand, it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established. In this and other area proceedings, when faced with the protests of carriers who have applied for routes outside the geographic limits of the Board's consolidation order, the Board has adhered to the practice of permitting these carriers to intervene and contest the issue of mutual exclusivity. This procedure was expressly approved in *National Airlines* v. *CAB,* 249 F. 2d 13 (D. C. Cir. 1957). It was followed scrupulously in the present case. Eastern was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented none.[9] This failure to make any showing of mutual exclu-

[9] At the hearing before the examiner Eastern requested that the applicants for the Chicago-Miami route be compelled to produce

sivity is fatal to Eastern's *Ashbacker* contentions. The cases which have dealt with this problem clearly suggest that it is incumbent upon the applicant asserting mutual exclusivity to substantiate the claim before the agency. *Delta Air Lines* v. *CAB, supra; National Air Lines* v. *CAB, supra.* We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made.

Second, Eastern points to three instances that it claims are such departures from orderly administrative procedure as to vitiate the Board's action. Eastern's contentions, which will be discussed in turn, relate to (1) a "press release" announcing the Board's tentative decision and released six months before the Board's opinion; (2) participation by assistants of Board members at Board meetings in which tentative awards were made; (3) receipt by the Board immediately prior to oral argument of alleged *ex parte* representations concerning an equipment program commenced by Capital Airlines, the carrier ultimately awarded authority between the cities of Miami and Cleveland, Pittsburgh and Buffalo.

Pursuant to a policy begun at some time more than two years ago, the Board, approximately two months after the completion of oral argument, issued a "press release" announcing the route awards it was granting in the *Great Lakes-Southeast Service Case.* The press release expressly stated that the announcement of the awards did not consti-

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data on the percentage of occupancy on some of the applicants' flights. The request was denied. Before the Board Eastern argued that this "load factor" data was relevant to mutual exclusivity. However, before the examiner Eastern argued only that this evidence was relevant to the ability of these applicants to improve upon Eastern service, or, in the alternative, to the inadequacy of load factor data as evidence in determining the caliber of existing service.

tute decisions in the case but that decisions would be entered and issued later. We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion.[10] The awards conferred by the Board's formal opinion, however, coincided exactly with those announced in the previous press release. Eastern claims that in effect this practice amounts to a prejudgment, in that the opinion, written six months subsequently, represents nothing more than a rationalization of conclusions previously reached; and that, therefore, the opinion is a nullity even if otherwise legally sufficient. We do not mean to express approval of the Board's practice of making public its tentative decisions. We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing.

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[10] The Board's explanation of its press release procedure is enlightening. Because of the complexity of the data presented to it in an area proceeding (see footnote 3, *supra*) the Board has found it necessary to make a preliminary, tentative decision, then to draft an opinion based upon it, and thereafter to take a further and perhaps final vote to accept or reject the decision embodied in the proposed opinion. Prior to the adoption of the press release procedure, the Board says that news of the Board's tentative decision seemed invariably to "leak" to interested outside persons. The stated purpose of the press release, therefore, is to make this information uniformly available to the general public and is an admission by the Board that "leaks" do occur and that the Board is powerless to prevent them.

Eastern objects to two of the Board's subsidiary awards[11] for the reason that at the tentative votes on these awards two assistants to Board members participated in place of their respective superiors.[12] However, leaving aside the fact that these votes were merely tentative, we note that the votes in question were cast only after two days of discussion by the Board when all of its members were present, and that the votes later cast by the assistants were cast in compliance with instructions given by their superiors. Accordingly, we find no improper delegation; and, assuming such right to exist, we find no deprivation of an applicant's right to joint deliberation upon his application by the Board members before vote is had upon it.

Eastern contends that the Board must have considered information in its hands relating to an equipment acquisition program announced by Capital three days prior to commencement of oral argument before the Board as bearing upon the issues here, and therefore Eastern was unfairly prejudiced since this information was not part of the record in the case. More specifically, Eastern objects to Capital's wide circulation of a press release relating to the equipment program and, branding this an effort to bring improper pressure upon the Board, Eastern demands that the record be reopened to determine Capital's fitness. In addition, Eastern claims that it was unfairly prejudiced because the manufacturer from whom Capital proposed to purchase its equipment communicated to the Board just prior to the beginning of oral argument the details of the proposed purchase. The Board assures us that the decision

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[11] These were an award to United to serve Columbus and Dayton on Washington-Chicago flights, and one removing from Northwest all restrictions on that carrier's Washington-Pittsburgh-Cleveland-Detroit route. Eastern had applied for each of the routes which these votes awarded to other carriers.

[12] The award to United was by vote of 4–0, one vote being cast by an assistant. The vote with respect to Northwest was 4–0, two votes being cast by assistants.

to award Capital the Miami-Buffalo, Cleveland, Pittsburgh route was uninfluenced by the announcement of Capital's equipment acquisition program. We have no reason to doubt this representation. The communication to the Board by the manufacturer was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case.*[13] See *Van Curler Broadcasting Corp.* v. *United States,* 236 F. 2d 727, 730 (D. C. Cir. 1956), *cert. denied,* 352 U. S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC,* 258 F. 2d 418 (D. C. Cir. 1958), is inapposite.

Finally, Eastern contends that, as to the following matters, the Board has failed to make appropriate findings or has failed to support its findings with substantial evidentiary findings: inadequacy of existing service; advantages purported to result from competitive authorizations; sufficiency of various markets to support additional carriers; and insubstantiality of Eastern's loss of revenues resulting from new authorizations.

As to the first two matters, the recent case of *FCC* v. *RCA Communications,* 346 U. S. 86 (1953), is controlling. The Court there indicated that an agency's determination that competition in and of itself was a desirable objective would be upheld provided that the agency based its determination upon its own expert knowledge of the industry under its control rather than on some general notion of national policy. In the present case the Board did determine that increased competition on air routes was desir-

[13] Equipment acquisition programs are relevant to a carrier's needs for additional revenue. At the time of the communication to the Board, the Board was conducting a comprehensive investigation of passenger fares. Second, a change in the ownership of Capital, a matter calling for Board approval under Sec. 408 of the Civil Aeronautics Act, 49 U. S. C. A. 488, could possibly result from the financing provisions of the proposed equipment acquisition program.

able when there was sufficient traffic.[14] Therefore, further findings with respect to inadequacy of service, or benefits to be derived from competition, are unnecessary. We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence.[15] See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951); *Colorado Wyoming Gas Co.* v. *FPC*, 324 U. S. 626 (1945).

We have examined Eastern's other contentions and have found them to be without merit.

CAPITOL

As hereinbefore stated, Capitol was an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes. Capitol's objections to the Board's decision are two: first, the Board failed to make findings concerning Capitol's fitness and the public need for its proposed service; second, the Board erred in allowing additional time at oral argument for statements by Members of Congress, several of whom stated a preference for Northwest, the carrier ultimately selected for the Miami-Chicago route. In connection with the second objection, Capitol has moved that this court appoint a Commissioner or Referee to determine whether

[14] "The Board in the past has recognized the benefits which accrue to the public from stiff multi-carrier competition in major traffic markets in the form of improved quality and quantity of service, increased coach service, utilization of the most modern equipment, etc. We believe that the authorization of a third Chicago-Miami carrier will bring comparable benefits here. We do not find that the services Delta and Eastern have provided are legally inadequate in terms of section 404(a) of the Act. However, we find that the Chicago-Miami market is sufficiently large now and has the inherent potential to support three carriers on an economic basis, and that the public interest will be served by certificating a third carrier." *Great Lakes-Southeast Service Case*, E-13024 [R. 15222].

[15] We note further that Eastern introduced no evidence on the issue of diversion, thus failing to sustain the burden required under *Clarke* v. *United States*, 101 F. Supp. 587, 594 (D. D. C., 1951).

Northwest procured the congressional representations, the motion assuming that Northwest initiative in this respect would constitute exertion of undue influence upon the Board by the carrier.

Capitol contends that Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, requires that the Board, when it is confronted with a series of competitive applications, make findings as to whether each applicant is fit, willing and able to supply the service applied for, and as to whether the service proposed by each applicant is required by the public convenience and necessity. Capitol relies upon Section 401(d)(1) of the Act, 49 U. S. C. A. 481(d)(1) which reads as follows:[16]

> "(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

As we read this section it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided *not* to grant the certificate. Courts have previous held that where one of competitive applications is held preferable to the others from the standpoint of public interest, no further findings with respect to the unsuccessful applicants is required. *Continental Southern Lines* v. *CAB*, 197 F. 2d 397, 402-403 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 831;

[16] The parties agree that the applicability of the Civil Aeronautics Act to this case is unaffected by its repeal and replacement by the Federal Aviation Act of 1958, 49 U. S. C. A. 1301 *et seq.*

North American Airlines v. *CAB*, 241 F. 2d 445, 448 (D. C. Cir. 1957). The findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence.[17]

We find no merit in Capitol's contention that congressional representations at oral arguments before the Board in favor of Northwest's application constituted undue influence. We so hold irrespective of whether Northwest activily solicited it. Equally without merit is Capitol's contention that the time consumed in listening to Congressional representations denied Capitol equal time with other applicants for oral argument, or that the failure to announce in advance that time would be allotted for congressional statements denied it an opportunity to prepare rebuttal and thereby denied it a fair hearing.

City of Nashville

The City of Nashville, Tennessee contends that the Board erred by excluding from consideration the needs of that city for improved air service. The Board's consolidation order[18] set as the westward limit of the geographic area under consideration a line from Chicago to Indianapolis to Louisville to Atlanta (and ultimately to Miami). Subsequently the westward limit was extended to include Chattanooga, Tennessee and Tallahassee, Florida. Nashville lies to the west of this westward limit as amended, and

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[17] Capitol seems to suggest that *American Airlines* v. *CAB*, 235 F. 2d 845 (D. C. Cir. 1956), cert. denied, 355 U. S. 905, and *Pan American World Airways* v. *CAB*, 261 F. 2d 754 (D. C. Cir. 1958), cert. denied, 359 U. S. 913, have enunciated a more exacting standard for administrative findings of fact. These cases are not applicable here. They merely hold that where the Board permits air operations by exemption under §416(b), 49 U. S. C. A. 496(b), rather than by the more rigorous procedure of certification under §401, 49 U. S. C. A. 481, the Board must give reasons for this shortcut by findings more specific than a mere echoing of statutory language.

[18] Order No. E-9734, issued November 16, 1955.

accordingly its service needs were not considered. We do not find that the geographic limits established by the Board were arbitrary or unreasonable, since we must always have in mind the need to keep the hearing within manageable proportions.[19] We find no error here.

Therefore, insofar as the Board's action is challenged by the petitions of Eastern, Capitol, and the City of Nashville, it is affirmed. Capitol's motion to refer certain matters to a Referee or Commissioner is denied.

Petition for rehearing denied.

J E L
C E C
S R W

Dec. 15, 1959

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[19] See note 3, *supra*.

APPENDIX C.

Opinions and Judgments Below.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 14798

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF NASHVILLE and THE NASHVILLE CHAMBER OF COMMERCE,
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
EASTERN AIR LINES, INC.,
INTERVENORS

No. 14804

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
EASTERN AIR LINES, INC.,
INTERVENORS

Appendix C.

No. 14812

EASTERN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE.
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
DELTA AIR LINES, INC.,
INTERVENORS

No. 14822

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
INTERVENORS

On Petitions to Review Orders of the Civil Aeronautics Board

Decided December 10, 1959

Appendix C.

Before PRETTYMAN, Chief Judge, and BAZELON and FAHY, Circuit Judges.

PRETTYMAN, Chief Judge: These are four petitions for review of orders of the Civil Aeronautics Board made in its *St. Louis-Southeast Service Case.* Principally the Board awarded to Trans World Airlines, Inc. (TWA) a new route from St. Louis to Miami and other Florida coast points, and to Delta Air Lines, Inc., a new Memphis-Birmingham route.

The cases in this court fall into two main parts, one relating to each of the above-mentioned awards. The discussion, however, more aptly falls into four divisions: (I) The mutual-exclusivity contentions advanced by American, Delta and National. These carriers claim that TWA was awarded an effective southern transcontinental route without consideration of economically mutually exclusive applications. (II) Impact of the award to TWA on an existing southern transcontinental interchange arrangement. (III) Eastern's contentions concerning mutual exclusivity. Eastern claims that the Board erroneously made awards to TWA and Delta without comparative consideration of its mutually exclusive applications. (IV) The merits of the TWA and Delta awards, apart from mutual-exclusivity arguments, and some miscellaneous contentions.

I

Two proceedings before the Board play parts in this problem. One is the *St. Louis-Southeast Service Case,* which was instituted to inquire into the need for service "between St. Louis on the one hand and Florida and other southeastern points on the other". Several applications were consolidated in that case.[1] As we have noted, the orders here under review were entered in that

[1] Order No. E-10304 (May 18, 1956); Order No. E-10651 (Oct. 2, 1956).

proceeding. The other case which plays a part in the contentions made to us is known as the *Southern Transcontinental Service Case.* It was a combination of several proceedings, which initially had various names. In its order of consolidation in the *Southern Transcontinental Case*[2] the Board delineated the scope of the proceeding to include (1) the need for single-carrier service between Houston and West Coast points, (2) the need for "single-carrier transcontinental service" between Florida points and the West Coast, and (3) the need for single-carrier transcontinental service between Atlanta-Birmingham and the West Coast. In that order the Board repeatedly used the expression "southern transcontinental route". The Board explained that in prescribing the scope of this hearing it intended to consider new or additional through service in the southern tier of states, that is, from Florida across the southern boundary of the country to and including California. The Board said in that connection: "• • • it is necessary to establish a framework in which all major southern transcontinental service issues as a whole can be determined for the foreseeable future." As thus arranged, the case included a large number of applications.

In the *St. Louis Case* various preliminary motions were made by different carriers, which motions fall generally into two classes. The first class was for expansion of the proceeding to include applications for extensions westward of existing routes into St. Louis from the East, so as to add to them routes from St. Louis to the West Coast, and in the opposite direction for extensions eastward of existing routes into St. Louis from the West, so as to add to them routes from St. Louis to the Southeast. These motions were denied. The other class of motions was to impose restrictions upon any grant of a new route from St. Louis to Florida points, so as to prevent any

[2] Order No. E-12861 (Aug. 5, 1958); Order No. E-13132 (Nov. 4, 1958).

grant of such a route from being in effect a through service Florida-California via St. Louis. In response to these motions the Board announced as a minimum restriction a requirement that service on any route granted between California points and Florida points via St. Louis must include a stop at St. Louis. And the Board further announced that the parties would not be foreclosed from advancing in the course of the hearing appropriate evidence which might reflect a necessity for more stringent limitations. Thus the Board limited the hearing in the *St. Louis Case* to service between St. Louis and Florida and other Southeast points.

The Board awarded to TWA the route from St. Louis to Florida points[3] and imposed as the sole limitation the previously described mandatory-stop requirement at St. Louis. TWA was already certificated for through service from St. Louis to California coast points, and the new award was cast in the form of an amendment to TWA's existing Route 2, which was the St. Louis-West Coast route. The effect of the order was to authorize one-plane, one-carrier, through service from Florida coast points to California coast points via St. Louis, with a mandatory stop at St. Louis.

The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast. For example, the Board pointed out that TWA's service, "operating nonstop from Los Angeles or San Francisco to St. Louis for expedited carriage to the Southeast onward from St. Louis, will provide a usable and convenient alternative service to the multiple-stop flights operated by the National-Delta American Interchange, and bring important service benefits to a respectable portion of the

[3] Order No. E-13026 (Sept. 30, 1958); Order No. E-13248 (Dec. 8, 1958).

passengers moving in these markets." And in its ruling on a motion for reconsideration the Board said:

> "The TWA award, of course, will permit that carrier to operate a usable one-stop, single-plane service between the West Coast and the points in the Southeast that are being added to its route. It was the carrier's ability to provide these 'beyond area' benefits that was responsible for our selection of TWA as the carrier to perform the *St. Louis-Southeast* services that were found to be required by the public convenience and necessity."

The principal point made by petitioners as to this award is that the Board could not restrict the nature and scope of the *St. Louis Case* to considerations limited to St. Louis-Florida points service, and then in that same case make an award which was for all practical purposes a one-carrier, one-plane, through transcontinental Florida to California route, when there were pending unheard in another proceeding (the *Southern Transcontinental Case*) many applications for transcontinental service Florida to California. This argument is premised upon the fact that the route awarded TWA makes its Florida-California service very slightly longer than would be any route which might be awarded in the *Southern Trancontinental Case.* This method of reaching an award, say the petitioners, is a direct evasion of the *Ashbacker* doctrine.[4]

The law which was established by the Supreme Court in the *Ashbacker* case has been sloganized, given a name, and is often discussed as though it were a technicality. The law which the Court there laid down was far from a technicality. The statute involved (the Communications Act) provided in effect that applicants for licenses should have a right to a hearing before their applications are denied. Two applications which were mutually exclusive were pending. The Court held that the Commission could

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[4] *Ashbacker Radio Co.* v. *Federal Communications Comm'n*, 326 U. S. 327 (1945).

not grant one without a hearing of the other. The Court said, *inter alia*:

> "For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before a denial of their applications becomes an empty thing."[5]

The ruling was a practical conclusion of sound common sense. It is simply a realistic truth that, if only one of several applications can be granted, an award to one applicant is as effective a denial of all the others as would be a flat order of denial.

The foregoing conclusions were premised upon a physical mutual exclusivity of two licenses. It is true, as the Board argues, that the application of the *Ashbacker* doctrine to awards of airplane routes presents many difficulties not in the radio cases. We pointed this out in *Eastern Air Lines* v. *Civil Aeronautics Board*.[6] We now iterate the doctrine there stated; the Board must have a considermeasure of discretion in limiting the areas to be considered in its air-route cases. But at the same time we emphasize that the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the *Ashbacker* doctrine.

Another general doctrine, based upon economic considerations, is pertinent to the present case. In many fields, including both communications and air transportation, an operating license requires a preliminary finding of public interest, convenience and necessity.[7] The public

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[5] *Id.* at 330.

[6] 100 U. S. App. D. C. 184, 243 F. 2d 607 (1956), cited and quoted in *Eastern Air Lines* v. *Civil Aeronautics Board*, 101 U. S. App. D. C. 156, 247 F. 2d 562 (1957).

[7] As to air transportation, Sec. 401(d)(1), Civil Aeronautics Act, 52 STAT. 987 (1938). The Federal Aviation Act of 1958, which supersedes the Civil Aeronautics Act, contains the same provision, Sec. 401(d)(1), 72 STAT. 754, 49 U. S. C. A. §1371(d)(1).

interest requires service for the public. It therefore requires that, if there be only enough business to support operation by one licensee, there must be only one licensee. This is a commonplace of public utility regulation. We discussed the principle at length in *Carroll Broadcasting Co.* v. *Federal Communications Comm'n.*[8]

The Civil Aeronautics Act[9] requires notice and hearing on applications for certificates for new routes, and also requires notice and hearing upon petitions for modifications of existing licenses, which latter include extensions of existing routes.[10] Under the Act (Sections 401 (d)(1) and 401(h))[11] a finding of public convenience and necessity is a requirement for either the grant of a new certificate or the extension of an existing route. So the principles we have been discussing apply to air certifications. If the grant of one of several applications for a new route does, as a matter of economic necessity, preclude the grant of any other application, the doctrine of *Ashbacker* clearly applies. Likewise, if the foreseeable traffic would support two carriers and there are, let us

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[8] 103 U. S. App. D. C. 346, 258 F. 2d 440 (1958). The principle is also discussed at length in the dissent in RCA Communications *v.* Federal Communications Comm'n, 91 U. S. App. D. C. 289, 294-296, 201 F. 2d 694, 699-701 (D. C. Cir. 1952), with citations, and is a thread which runs through the opinion of the Supreme Court in that case, Federal Communications Comm'n *v.* RCA Communications, Inc., 346 U. S. 86 (1953). This was a telegraph case, in which the competition involved was economic, not a radio case in which the exclusivity is physical. Gerico Investment Co. *v.* Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958), prior to *Carroll*, contains a clear intimation to the same effect.

[9] Sec. 401(c), 52 STAT. 987 (1938), as reenacted, 49 U. S. C. A. §1371(c).

[10] Sec. 401(h), 52 STAT. 989 (1938), as reenacted, 49 U. S. C. A. §1371(g). See, *e.g.*, Eastern Air Lines, Inc., et al., Great Lakes to Florida Service, 6 C. A. B. 429 (1945); Delta Air Corp., et al., Service to Atlanta and Birmingham, 2 C. A. B. 447 (1941).

[11] *Supra* notes 7 and 10.

say, five applicants, the grant of any one is an effective denial of three of the remaining four applications, and *Ashbacker* applies.

The Board denies the applicability of *Ashbacker* in this latter situation and refers us to *Pauley* v. *Federal Communications Comm'n.*[12] However that case involved neither a grant nor a denial of an application and thus is not remotely pertinent to the situation now before us.

The doctrine of *Ashbacker* also applies where a request for an extension of an existing route would preclude the grant of other pending applications for the entire route. If one certificate for a route exists, and if the grant of a second competitive route would as a matter of economic fact destroy or substantially reduce the rendition of the service required by the public interest, the public interest precludes the competitive grant. The Board has frequently recognized and applied this latter rule; as a matter of fact it almost always does so.[13]

This bring us to a consideration of the practicalities of the situation in the case before us. The characteristics of a restricted-area service are entirely different from those of a transcontinental service. This is well recognized in the industry. We think the Board cannot be compelled to expand an area case: but at the same time it cannot be permitted to transform the nature of an area case without applying to it the factors which govern the case as trans-

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[12] 86 U. S. App. D. C. 294, 181 F. 2d 292 (D. C. Cir. 1950).

[13] See, *e.g.*, Southern Transcontinental Service Case and Dallas to the West Service Case, C. A. B. Order No. E-12861 (Aug. 5, 1958); Investigation of Service to Winston-Salem and/or Greensboro-High Point, C. A. B. Order No. E-12873 (Aug. 8, 1958), 1A Av. L. Rep. par 22,192; Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953); Transcontinental & Western Air, Inc., et al., Detroit-Memphis Service, 6 C. A. B. 117 (1944). *Cf.* Seven States Area Investigation, C. A. B. Order No. E-13254 (Dec. 8, 1958), 1A Av. L. Rep. par. 22,226, 22,226.11 (new competitive service would be too costly to the Government in subsidies).

formed. It cannot hear an area case and, without more, make a transcontinental award. It cannot thus ignore pending applications for a transcontinental route certificate, if those applications are mutually exclusive with the award being made. Petitioners, or some of them, had pending applications for through routes Florida to California coast. These were consolidated in the *Southern Transcontinental Case.* They endeavored by motions in the *St. Louis Case* to persuade the Board to do one of two things, either restrict any award in that case so stringently as to preclude its being effective through southern transcontinental or give comparative hearing to all pending applications for such a route. They now argue to us that the maximum power of the Board under the statute, construed according to *Ashbacker,* was limited to these two alternatives. The Board apparently agrees with the general principles underlying these arguments; references to them appear in the orders of consolidation.

So the first debated question in whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer.

In its initial opinion which supported the order in the proceeding now before us, the Board emphasized that the route to be awarded TWA, involving only 12 per cent circuity over a more direct routing between the Southeast and the West Coast, would provide a convenient alternative service to the existing National-Delta-American Interchange. It noted American's estimate that the new award would divert about 50 per cent of the existing interchange traffic.

Appendix C.

In prior proceedings the Board had concluded that the available business would not support two southern transcontinental interchange arrangements. In 1951, after a comparative hearing of all then-pending applications, it licensed a single-plane Florida to California service via New Orleans-Dallas by an interchange arrangement operated by American, Delta and National.[14] A year later the Board, without further hearings, authorized a competitive interchange service.[15] This court issued a stay, and thereupon the Board revoked the award and ordered an evidentiary hearing.[16] The board then found that the proposed new service would be hopelessly uneconomic and denied the certificate.[17] One finding of the Board was that:

> "• • • the record now shows that the proposed interchange could not obtain for itself sufficient traffic to meet the expenses of even one daily round trip from the west coast to Miami."[18]

The Board later reexamined its findings, opinion and decision and reaffirmed its conclusions.[19] Thus the Board in 1954 concluded, after extensive evidentiary hearings, that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services.

All the applications consolidated in the *Southern Transcontinental Case* seem to have included the possibility of one or more stops. Nowhere is it made to appear that

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[14] Southern Service to the West Case, 12 C. A. B. 518.

[15] Southern Service to the West Case, 14 C. A. B. 310 (1951); Southern Service to the West Case, 15 C. A. B. 94 (1952).

[16] Southern Service to the West Case, 15 C. A. B. 124.

[17] Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953).

[18] *Id.* at 236.

[19] Southern Service to the West Case, Reopened, 18 C. A. B. 790 (1954).

any such applicant sought only a nonstop certificate, to which service the TWA one-stop service might not be potentially competitive. The comparative circuity of the St. Louis route over the proposed through routes would appear to be no greater than over the existing interchange. If the TWA one-stop service is an effective competitor to the existing interchange to the extent of a 50 per cent diversion of the latter's business (assumed by the Board *arguendo*), it seems to us the TWA service must, *prima facie,* be viewed as a potential competitor to some similar extent of any awardee of a transcontinental route Florida coast to California coast involving one or more stops. And, if the Florida-California business via interchange is enough to support service on only one route, the same business available via one carrier, but with a stop, would appear *prima facie* to be not too much greater. If these things be so, an analysis and evaluation of the available business is necessary, if demanded. To state the matter in other terms, if mutual economic exclusivity is claimed and the claim has a reasonable *prima facie* basis, hearing on the question is required.

The Board submits several answers to the foregoing. In the first place the Board says that the motions for consolidation in the *St. Louis Case* filed by some of the applicants for single-plane, single-carrier service from Florida to California were filed too late. Rule 12(b) of the Board's Rules[20] requires that motions to consolidate must be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. In the circumstances of the present case this is an unrealistic suggestion. Some of these applicants made efforts to have the Board expand the *St. Louis Case* so as to include transcontinental considerations. This the Board refused to do. The Board strictly limited that case to issues relating to St. Louis-Southeastern points service. With the issues

[20] 14 CFR 302.12(b).

thus restricted, counsel for these applicants properly restricted their participation to the presentation of evidence which was relevant to those issues. As a matter of fact the Administrative Procedure Act[21] requires the exclusion of irrelevant evidence. Indeed, as the Board seems to recognize in a footnote (5) to its opinion on reconsideration, the posing of the issue as to restrictions was an indication that the Board would prevent any award in the case from being a transcontinental route—quite the contrary to any indication that transcontinental service was to be the subject of the hearing.

In the second place the Board says that all of these applicants were in fact participants in the *St. Louis Case* and, as such, had an opportunity to present whatever evidence they desired to present. But this suggestion is also unrealistic under the view which we have described as applicable to the timeliness point. The Board says that these applicants were well aware of the implications of the TWA application. They obviously were initially so aware, as is evidenced by their various motions and informal requests at the beginning of the case; but, as we have pointed out, the Board severly restricted the issues to be adjudicated and as to which these parties (as applicants or as intervenors) were permitted to participate.

In the third place the Board says it made findings to the effect that there is no mutual exclusivity between the TWA award and the possible grant or grants of the applications now consolidated in the *Southern Transcontinental Case*. The Board points to certain passages in its two opinions as being findings that there was no mutual exclusivity. It cites to us such passages as that the TWA route "would not in any real sense preclude a finding of public need for a more direct routing," and that the

[21] Sec. 7(c), 60 STAT. 241 (1946), 5 U. S. C. A. §1006(c).

award would not "warrant the assumption that TWA will thereby obtain preferential status in deciding the issues in that case." The Board recited that there is no mutual exclusivity, but the quotations hardly qualify as "findings". They are not based on evidence, and they are not consequent to a hearing on the issue of exclusivity.

The question presently before us is not whether the Board might on some evidence before it conclude that there was no mutual exclusivity; the question is whether the applicants are entitled to a hearing on the issue. Their statutory right is to a hearing before denial of their applications; provided, of course, that the allegations, of fact are sufficient to raise a debatable question. The right to a hearing is the sole question before us.

On this part of the case we hold: (1) The Board had ample authority to limit the *St. Louis-Southeast Case* to considerations pertaining to that area. (2) After the Board had restricted the case to area considerations and had proceeded to the end on that basis, it could not, in that same case, make a transcontinental award. (3) A *prima facie* indication of economic mutual exclusivity between the applications consolidated in the *Southern Transcontinental Case* and the route awarded in the *St. Louis Case* to TWA appears in this record. The case must therefore be remanded.

We do not intimate to the Board what steps it should take upon this remand. Our holding does not necessitate a full evidentiary comparative hearing on all applications for a southern transcontinental route. The Board might, among a number of alternative courses, (1) hold a hearing upon the exclusivity question alone or (2) impose such a restriction upon the route award to TWA via St. Louis as to insure that it would not be an effective competitor with any single-plane, single-carrier transcontinental route which might result from the *Southern Transcontinental Case.*

II

As we have indicated, a three-carrier interchange authorizing Florida-California service via New Orleans and Dallas had been licensed in 1951. American argues that the award of a competitive transcontinental service Florida to the West Coast would be a modification of the existing interchange license to which it is a party. We held to the contrary in the *Gerico* case,[22] there concluding that economic damage to an existing licensee is not a modification of the existing license, absent agency rules guaranteeing protection from economic injury.

Petitioners American and Delta also argue that the foreseeable impact of a possible award in the *St. Louis Case* was clearly such as to raise an issue of the public interest in a duplication of services. We have said enough under I, *supra*, to show we agree with that argument. The question required solution by evidence and findings, if a transcontinental award was to be made.

The Board recited its conclusion that the award to TWA was required by the public interest and necessity. But that conclusion was related to a St. Louis-Southeastern-points route. It is entirely true that in making such a finding in a limited-area case the facts of the air transportation system compel consideration of out-of-area factors. We pointed this out in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*.[23] But that is not our present problem. The problem is the public interest in a competing southern transcontinental service.

The Board makes much of the point that the foreseeable diversion of traffic from the interchange partners is not material to them in the light of their overall resources. The point is immaterial on the question whether these carriers are entitled to a hearing on the possible existence of mutual exclusivity.

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[22] Gerico Investment Co. *v.* Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958).

[23] 104 U. S. App. D. C. 78, 259 F. 2d 808 (1958).

III

We come now to Eastern's contentions respecting its application for an extension of its Route 10 westward from St. Louis to the West Coast and its application for an extension from Memphis to Kansas City. The former controversy concerns the award to TWA and the latter the award to Delta.

Eastern's motion in the St. Louis Case for consolidation of its pending application for a westward extension of Route 10 was denied. Eastern contends that without comparative consideration of its (Eastern's) application the award to TWA of a transcontinental service virtually identical to that proposed by Eastern violated the latter's rights under *Ashbacker*.

Eastern's application for a westward extension of Route 10 must be considered from two points of view. It must be considered from the point of view of the case as a St. Louis-Southeastern-area case, which is what the Board declared it to be. Then it must be considered from the point of view of a through southern transcontinental route, which is what our petitioners say the Board considered in fact.

Eastern has a network of certificated routes spread over the eastern half of the country, with westernmost termini at Chicago, St. Louis, Memphis and San Antonio. An extension from St. Louis to the West Coast would in actual practical fact create for Eastern a Boston-New York-West Coast route via St. Louis, as well as a Florida-West Coast route. The traffic accumulated by the Boston-St. Louis network is part of the "back-up traffic" which the Board says would be fed by Eastern into its new segment St. Louis-West Coast. That the traffic thus picked up in the Northeast would be greater than that originating in the Southeast seems obvious.

Quite clearly the route sought by Eastern from St. Louis westward was not within the area of the case. Also

quite clearly its route Boston-New York-West Coast via St. Louis would not have been a southern transcontinental route. So, if that were all that is involved, no problem would be presented. But, as we have noted, Eastern's requested extension would also connect at St. Louis with its existing St. Louis-Florida-coast route.

We first consider Eastern's application as a part of the *St. Louis Case* as a true area case. Eastern's extension west and TWA's extension east presented different problems in respect to traffic and the area. TWA's extension was physically within the area, and the out-of-area traffic which was involved would flow from existing routes into and through the area over the new segment. This traffic is certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well, as the Board found, be used to provide the base for proper traffic development within the area.

The basic consideration in an area case is, of course, the public interest in and necessity for service in the area. It seems to us that the need of the area for service to traffic coming in from the outside and also the need of the area for service from inside the area to the outside are both proper considerations in an area case. And so the Board can properly take such needs into consideration. But we think the needs of outside traffic, considered as such, are not necessarily pertinent to an area case. Thus, to illustrate, if traffic originating in Seattle wanted very badly to go to Miami, such need, if not linked with some need inside the southeast area, would not be relevant to a southeast area case. The Board could restrict the area case by excluding such wholly outside data.

Eastern's new segment would have been outside the area, and the traffic picked up by it would have been newly picked up for transportation into the area over an existing service in the area. In other words, this application posed the problem of creating in an area service case a new route

outside the area for the purpose, or with the effect, of bringing traffic into the area under consideration. We think the Board cannot be compelled to expand an area case in that way. We think this situation falls within the power of judgment vested in the Board to limit these area cases. We find no error which would require or justify our interference in the Board's decision as a limitation upon a true area case.

We now look at this application of Eastern as part of a southern transcontinental consideration, which, as we have pointed out, is what the Board appears to have undertaken and decided in part in this proceeding. Eastern's existing certificate for Route 10 apparently authorized through service St. Louis-Florida coast points. The record shows, as the Board recites in its Order No. E-13026, that Eastern actually began the operation of such a through service St. Louis-Miami nonstop. So Eastern's application for an extension westward from St. Louis would have given it a Florida-West Coast route with one stop at St. Louis. The eastward extension awarded TWA was St. Louis-Miami via intermediate points Nashville, Atlanta, Tampa and St. Petersburg. So TWA under the award could duplicate Eastern's existing St. Louis-Florida service, either with the stops indicated or nonstop, and the transcontinental route created for TWA by the award is a duplicate of the transcontinental route which would have been created for Eastern by a grant of its application.

Therefore, looking at the matter from the standpoint of a transcontinental service, Eastern occupies substantially the same position occupied by the other applicants for transcontinental certificates, discussed by us in I, *supra.*

The one factor possibly differentiating Eastern's transcontinental application from those of the other applicants in this case is that Eastern's proposed St. Louis-West Coast route would not be merely a southern transcontinental route but would connect to the West Coast all of Eastern's network of routes in the East. It was on this basis, and on a

consideration of the potential traffic between St. Louis and points west thereof named in the application, that the Board reached its conclusion of no mutual exclusivity. The direct question as to exclusivity is whether TWA's St. Louis-Florida segment will prevent a grant of Eastern's St. Louis-West Coast segment. These are not two segments over the same route but come into competition one with the other when they are linked up with the respective existing networks. Thus the whole of both carriers' systems seem to be involved. The Board mentioned as a decisive factor the whole of Eastern's potential traffic, given the new award. It did not mention the comparative whole of TWA's potential traffic, given the new award. The Board's reasoning and the bases for its conclusion on this point are by no means clear. It refers to the substantial "back-up" traffic available to Eastern from its entire eastern network and to "these varied traffic sources". This could mean (1) that the Board did consider the whole of the traffic potentialities of both carriers, or (2) that the Board deemed the traffic potential of the single St. Louis-Southeast route awarded TWA as *de minimis* in comparison with the whole of the traffic potentially available to Eastern from the entire southeastern area and the Northeast, or (3) some other meaning not readily discernible. So we are unable to determine whether the Board's action was or was not valid. Upon the remand the Board will make a clearer definition of its conclusion upon this point and the reasons therefor.

The Board contends that Eastern did not avail itself of the opportunity presented to it to offer evidence in support of its claim of exclusivity. The record shows, however, that Eastern, in its petition for reconsideration of the Board Order No. E-13026, did refer to some facts on which it relied to show mutual exclusivity. The Board's reply, with its reference only to traffic available to Eastern, was inadequate. Therefore, despite Eastern's awareness that the issue of mutual exclusivity was open to it during all stages of the hearing, the Board's failure to make the

necessary specific findings deprived Eastern of the full hearing required by *Delta Air Lines* v. *Civil Aeronautics Board.*[24]

In sum, as to Eastern and TWA: If the Board proceeds with the *St. Louis Case* so restricted as to constitute it a true St. Louis-Southeastern points area case, it need not consolidate Eastern's application for the westward extension. But, if it proceeds with the case as in practical effect a transcontinental route case, it must make adequate findings upon the problem of exclusivity, which may or may not involve a further hearing.

The situation of Eastern *vis-a-vis* Delta is that Delta applied for and was awarded a new segment Memphis-Birmingham, which was within the St. Louis-Southeastern area and constituted a link in a St. Louis-Florida coast service, whereas Eastern applied for and was denied a new segment Memphis-Kansas City, the latter point being well outside the area of the case and this segment being no part of a St. Louis-Southeastern service. The question is whether Eastern's Memphis-Kansas City application was required to be consolidated for comparative hearing with Delta's Memphis-Birmingham application.

Delta already has certificated routes in the St. Louis-Southeastern area. These include routes from St. Louis to Memphis and from Memphis roundabout to Jackson-Meridian-Birmingham-Atlanta and thence to Miami. It also has a route Kansas City-Memphis. Eastern, as we have noted, already has certificated routes in the St. Louis-Southeastern area, among them one Memphis-Birmingham-Atlanta and thence to Miami. Eastern urges that the grant to Delta of the Memphis-Birmingham segment creates for Delta a through service Kansas City-

[24] 97 U. S. App. D. C. 46, 228 F. 2d 17 (1955). It is true that, unlike the instant case, the *Delta* case did not involve an application for a new route segment outside the limited area under consideration. However, the reasoning of that opinion requires the same kind of hearing in a case such as this, where a *prima facie* showing is made of mutual exclusivity of applications for a particular route.

Florida coast, and that its (Eastern's) application for a segment Kansas City-Memphis would have created for it, *inter alia*, precisely the same through service Kansas City-Florida points. The Board says (1) that consideration of this Eastern application would be an unwarranted expansion of the area case, and further (2) that the mandatory stops required by it to be made by Delta on any single-plane flights Kansas City-Florida points are sufficient to prevent the award from creating a service which would in any degree preclude an eventual grant to Eastern of the Kansas City-Memphis extension, with authority to overfly Memphis.

Eastern's position is, in effect, that the same considerations which apply to the treatment of the transcontinental route problem, as it arose in the *St. Louis Case*, apply likewise to the Kansas City service problem as it arose in that same case. We think they do not. The expansion of an area case by adding a little additional segment outside the area is quite a different thing from awarding a transcontinental certificate in a limited area case. The former is an expansion of a limited case. The latter is a transformation of the real nature of the proceedings. We are of opinion that the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment.

Eastern complains that, although the Delta award would not be mutually exclusive with one part of its application, it would preclude the award to Eastern of another part of its application, namely, the identical route, with the same mandatory stops, as that obtained by Delta. Eastern complains that the Board made no finding on this point. This Kansas City-Memphis-Birmingham-Atlanta-Florida route would be one of many combinations of routes available to Eastern from Kansas City to Southeast points. But to consider this one route separately would be to require the dissection of an area case into a number of competing segments and to require comparative consideration of each

pair of parts of applications. We think there is no such requirement. Moreover in this contention Eastern splits its unrestricted application into small sections and urges that the several sections must be compared with similarly segregated sections of other applications. We think the Board is not required to do this. Were the law otherwise, the Board would be burdened with a flood of applications and motions, with consequent hearings thereon, filed by airlines whenever a new route was proposed which served any point already served by the protesting line. Such a tangle would prevent the Board from performing its statutory duty of upholding the public interest by fostering a sound air transportation system.

IV

Eastern contends that the TWA and Delta awards were not made upon proper findings of public convenience and necessity based on substantial evidence; that the record requires a finding that Eastern could and would satisfy all service needs in the St. Louis-Southeast market; that the Board failed to make sufficient findings on the cumulative diversion of revenue from Eastern because of awards made in this and other cases; that the Board failed to make adequate findings of the market potential; and that TWA was awarded an Atlanta-Florida service without any finding of need for such service. We have examined the record and find these contentions to be without merit. While it is true that there is some evidence to support Eastern's position on certain of these issues, there is substantial evidence to uphold the challenged findings of the Board. Eastern's basic arguments concerning the lack of need for the creation of new service competitive to Eastern in the St. Louis-Southeast market are intimately tied to its contention that the Board erroneously failed to reopen the record to receive new evidence of Eastern's operations after the commencement of the

hearings. These several contentions of Eastern must be viewed against the background of findings by the examiner and the Board, upon extended evidence, that Eastern's service in the Southeast area had been inadequate, that Eastern had not developed the potential market, that more traffic would result from improved service, and that there was a public need for competition in the area. Upon the facts of this case, we think the Board did not abuse its discretion in declining to reopen the record.

It is true that the Board did not find any need for the Atlanta-Florida service award to TWA, considered as local service. But it specifically found a need for trunk-line service from St. Louis-Nashville to both Atlanta and Florida. We find no error in the Board's award of the route without an absolute restriction against local service between Atlanta and Florida.[25] The Board did place a long-haul restriction on the Atlanta-Florida segment award to TWA.

Delta, while agreeing with the Board's findings on the need for a new competitive St. Louis-Southeast route, contends that the Board erred in that it awarded the new route to TWA on the basis of a "need" not in issue and failed to make certain comparative findings as to Delta's and TWA's qualifications for the route. Delta attempts to demonstrate that the Board, without so saying, actually picked TWA as the awardee upon a consideration of needs of out-of-area traffic. It says the Board specifically excluded from the issues in the case the service needs of out-of-area traffic, *i.e.*, the needs of cities west and north of St. Louis for service into the Southeast area. Nevertheless, says Delta, the Board based the award to TWA upon such needs. But it clearly appears that the only use the Board made of out-of-area traffic data was as one of the factors in selecting the carrier best able to meet the needs of the area. The Board said:

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[25] It should be noted that Eastern made no request for any such restriction.

> "Aside from seasonal factors, the end-on-integration of the extension from St. Louis to the Southeast with that portion of route No. 2 extending west of St. Louis will permit TWA to combine the traffic flow to and from cities east and west of St. Louis, *so as to support maximum frequencies in the St. Louis-Southeast markets and better develop the traffic potential in this area.*" (Emphasis added.)

This course was approved by us in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board, supra* and discussed herein in relation to Eastern's claim. The use of out-of-area traffic data for these purposes has no reliance to the point discussed by us in Part I, *supra*, which was the right of competing applications to a hearing when a transcontinental route is being awarded. We find no reversible error in the Board's selection of TWA as the awardee, if the Board is to make an area award only.

We have examined Delta's remaining contention, that the Board failed to make adequate comparative findings on certain points and find nothing that requires us to disturb the Board's disposition. It is clear that the Board in its original opinion discussed Delta's qualifications in comparison to those of TWA. Various other errors allegedly committed by the Board are urged upon us. We have examined these contentions and find no reversible error.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Before:

PRETTYMAN, Chief Judge, BAZELON and FAHY Circuit Judges, in Chambers.

Appendix C.

Order.

Upon consideration of the motion of Delta Air Lines, Inc., to conform judgment of this court to the opinion, it is

ORDERED that the judgment of this court in these cases is amended to read as follows:

> "These cases came on to be heard on the record from the Civil Aeronautics Board and were argued by counsel.
>
> "On consideration whereof, it is ORDERED and adjudged by this court that the orders of the Civil Aeronautics Board on review in these cases are affirmed with respect to the award to Delta Air Lines, Inc., and are reversed with respect to the award to Trans World Airlines, Inc., and that with respect to the award to Trans World Airlines, Inc., these cases are remanded to the Civil Aeronautics Board for further proceedings not inconsistent with the opinion of this court."

It is FURTHER ORDERED by the court, sua sponte, that the last paragraph of the opinion of this court is amended to read as follows:

> *"Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion."*

Dated: January 7 1960

Per Curiam.